AMERICAN BAR ASSOCIATION
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CURRENT EVENTS

Section Chairmen Meet in Chicago

BETTER coordination of the activities of the various sections and a more concerted planning for the section programs at the annual meeting were the objectives of a meeting of Section chairmen called by President Frank J. Hogan and held in Chicago on October 17. Those present at the president's call included Thomas B. Gay, Chairman of the House of Delegates, Secretary Harry S. Knight, Treasurer John H. Voorhees, Assistant Secretary Joseph D. Stecher, and the following section chairmen: R. Allan Stephens, Bar Organization Activities; Jacob M. Lashly, Commercial Law; James J. Robinson, Criminal Law; Lionel P. Kristeller, Insurance Law; William Roy Vallance, International and Comparative Law; Ronald J. Foulis, Junior Bar Conference; R. G. Storey, Legal Education and Admissions to the Bar; Henry P. Chandler, Municipal Law; Thomas E. Robertson, Patent, Trade-Mark and Copyright Law; Harold J. Gallagher, Public Utility Law; and George E. Beers, Real Property, Probate and Trust Law.

The meeting convened in the morning, adjourned for lunch and worked through the afternoon. Each section chairman was called on and asked to state the program of his section for the coming year. Plans for the annual meeting were discussed, and each chairman indicated how many sessions his section would need in San Francisco.

When the House of Delegates meets on January 9 at the Edgewater Beach Hotel in Chicago, five section councils will also be meeting. These council meetings will be held so as not to conflict with the sessions of the House. The chairman of the Sections of Patent Trade-Mark and Copyright Law, Criminal Law, and International and Comparative Law announced they would have resolutions to bring before the House at the January meeting.

President Hogan in his introductory remarks referred to the important development which is taking place this year, in the holding of legal institutes in various parts of the country. He stated that consideration is being given to the scheduling of a legal institute in San Francisco, during the convention, as a part of the Assembly program.

St. Louis Law Library Association Celebrates Hundredth Anniversary

ON September 21 the Law Library Association of St. Louis celebrated its centennial by a banquet at the Hotel Jefferson. Mr. H. Chouteau Dyer, president of the association for the last fifteen years, presided, and Mr. Gamble Jordan, who has served the association as assistant librarian and librarian for fifty-two years, cut the hundred candle birthday cake. Other speakers included Judge O'Neil Ryan of the St. Louis Circuit Court and Judge Merrill E. Otis of the United States District Court in Kansas City.

Chicago Creates Bill of Rights Committee

THE Chicago Bar Association has become one of the first of the larger local associations to create a Committee for the Defense of Civil Rights. In naming Mr. Adlai E. Stevenson as chairman of this committee, Mr. Henry P. Chandler, the association's president, said:

"There is reason to fear that freedom of speech and of assembly in this country are in danger. No argument is necessary that opportunity for peaceable discussion is indispensable in popular government. Opinion driven underground sooner or later will explode disastrously, or worse if it dies, will leave the people spiritless, servile, a poor substitute for a self-respecting nation.

"Lawyers traditionally have been the defenders of rights of liberty as well as of property. These rights are not antithetic. They go together. . . . The time has come for this association to take the initiative in a new declaration of loyalty to the guaranties of liberty in the bill of rights. Would we increase respect for the constitution on the part of the masses of the people? There is no better way than to let it be known that the constitution protects the humblest in expressing their opinions upon any subject and in trying to persuade others, as long as they act peaceably. I crave for The Chicago Bar Association an honorable part in keeping freedom alive and enlarging it in these United States."

MID-WINTER MEETING OF THE HOUSE OF DELEGATES

IN PURSUANCE of the resolutions of the House of Delegates, adopted at its recent meeting in Cleveland, providing for a two-day meeting of the House in Chicago between the fifth and fifteenth days of January, 1939, and directing the Chairman of the House to designate the days upon which such meeting should be held, it is hereby announced that January 9 and 10, 1939, have been designated by the Chairman of the House as the days upon which such meeting shall be held.

The sessions of the House will be held at the Edgewater Beach Hotel, Chicago, Illinois, beginning Monday, January 9, at 10:00 A. M., Central Standard Time.

HARRY S. KNIGHT, Secretary.

Unapproved Evening Schools Refused Recognition in Missouri

ACTION by the Missouri Supreme Court this summer is reported as further raising the standards of bar admission in that state. A rule was adopted by the Court that no evening law school having a four-year course shall be approved by the State Board of Law Examiners unless the school is fully approved by the Council of Legal Education of the American Bar Association.

Not including Missouri, there are now four jurisdictions which require a minimum of three years of study successfully pursued in an American Bar Association approved school, twelve others where law school study is not recognized as qualifying for the state bar examinations unless it is pursued in a school approved by the American Bar Association, and half a dozen other states where this rule is applied to out-of-state schools with but one or two exceptions. A similar rule is under consideration in at least three other states, and the trend toward recognizing only study in a school approved by the American Bar Association has been greatly accentuated by the increased percentage of approved schools. Out of 185 law schools, 99 are now on the approved list of the American Bar Association and these schools contain over 60 percent of the present student body.

The Dallas Bar Pioneers in Two Fields

A SECOND volume of the addresses given at the weekly clinic of the Dallas Bar Association has just made its appearance under the title "The Dallas Bar Speaks—1937."

The book begins with a history of the work of the association during the year under the presidency of J. Cleo Thompson,—including the employment of a full time secretary,—and continues through 272 pages of speeches, most of them on subjects of practical value. This Saturday morning clinic, inaugurated by former President D. A. Frank several years ago, has a widespread reputation and is given a large share of the credit for the association membership of 820 out of the 850 lawyers in Dallas.

The topics covered by the addresses include many of definite value to the practitioner on such subjects as "Proofs of Loss Under Insurance Contracts," "The Functions of Trustee in the Texas Deed of Trust," "Stockholders' Bills," "The Doctrine of Correlative Rights in Oil and Gas Reservoirs as Affected by Recent Gas Litigation" and "The Law of Patents."

Pre-trial Procedure

The association is also a pioneer in its close working arrangement with the local bench in regard to the pre-trial procedure which is being employed. Before being adopted this was discussed and approved by the association. A recent report to the state bar association indicates the success of the trial period. It states:

"The 'Pre-trial Plan,' adopted by the association March 15th last on the basis of a six-months' trial, upon the unanimous recommendation of the District Judges, was continued in effect by an overwhelming majority-vote of the association. The record shows the disposition of approximately 30 per cent more jury cases, a substantial saving of time to witnesses and litigants, a reduction of jury costs, earlier trial of cases, more definite settings, and as a rule, a more speedy administration of justice. The Dallas Bar is of the opinion that the pre-trial plan has furnished a vehicle for a speedier and more economical administration of justice."

The present president of the Dallas association is J. Woodall Rodgers.

Chicago's Bar Primary

IN states and localities in which the lawyers are struggling with the all-important task of bringing about the nomination and election of competent and courageous judges, there is always keen interest in the earnest and well-planned efforts of the Chicago Bar Associaion in that field. The activities of the Association this year have been in keeping with that tradition.

First a Committee on Candidates for judicial office made a thorough and unbiased study of the records of the judges whose terms of office expire in 1938. The committee also sent out a questionnaire to the lawyers who practice in the Courts, to obtain from them the experience and opinion of the profession as to those judges. Then the Committee on Candidates submitted its impressive report to President Henry P. Chandler and the Board of Managers of the Chicago Bar Association. In turn, the Board of Managers sent copies of the report, containing biographical data, photographs, information from the questionnaire, etc., to each member of the Association, for his information and use in connection with the Bar primary conducted by the Association, in which the lawyers express by secret ballot by mail their preferences, and their recommendations to the general electorate, as between the respective nominees for the judicial offices to be filled. Despite the highly difficult conditions obtaining in a very large city, all this is done by the Chicago Bar Association in active furtherance of its belief that "a high standard of judicial fitness should be maintained and observed in the selection of judges of all our Courts and that true progress demands a constantly rising standard."

The trenchant declaration of principles by this year's Committee on Candidates should be noted and heeded by the lawyers of every community in the United States:

> "The primary qualities of a judge are Uprightness, Integrity, Legal Ability.
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> "To these should be added other qualities which the ideal judge will ever strive to attain: courage, independence, impartiality, open-mindedness, industry, attentiveness, courtesy, patience, punctuality, dignity.
>
> "Judges possessing these qualities adorn the office they hold and lawyers with great unanimity approve them; they hold the confidence of the people and preserve the respect which a democratic people intuitively bestow upon their Courts; they give strength to the faith of the people in the integrity of their judges,—a basic concept in democratic government.
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> "The exigencies of partisan politics in great cities often prevent the realization of these standards in party selection of candidates for judicial office, but the Bar should never relax its vigilance in scrutinizing judicial candidates according to such standards. Until better methods of selecting judges are provided, the Bar Association must continue its appeal to the people to support by their votes those candidates approved in its Bar primary following the painstaking investigation made by the Association."

For thoroughness and plain speaking, the Committee's work is impressive. The comments on individual nominees are tersely significant, and are usually supported with specific facts, to negative any inference of dogma or favoritism. Aids to reasoned choice are given. Three incumbent judges in the Municipal Court are called "unqualified," for reasons stated. In some instances, both nominees are commended. Sometimes one is called "well-qualified" and the other "qualified." A sitting traffic judge is said to be "able, painstaking, diligent and serious in purpose," but he is censured for broadcasting proceedings in his Court and for his practice of letting minors escape a record of conviction if they will go to the morgue and look at the victims of automobile accidents and pay, instead of a fine, something for the rehabilita-

(*Continued on page* 946)

Are You Going to San Francisco?

THE Committee on Arrangements for the San Francisco Meeting (July 10-14, 1939) invites suggestions from the members of the Association who will attend and are interested in special travel arrangements and in post-convention tours, to the end that plans may be made that will appeal to those who make the journey.

It has been suggested that the early date of the meeting makes a sight-seeing tour of any length on the going journey seem impracticable, but no decision will be made until the Committee is advised of the wishes of the members, who are requested to inform the Committee on Arrangements, 1140 North Dearborn Street, Chicago, Illinois, whether they are interested in any one or more of the following plans:

1. A special train party, going direct from Chicago to San Francisco, without stopovers, to arrive at San Francisco on Sunday, July 9.

2. A special train party, leaving Chicago Sunday, July 2, arriving at San Francisco Sunday, July 9, traveling over a northern transcontinental route, and providing opportunity for stops at nationally known points of interest en route.

3. Return trip via southern route, arriving at Chicago approximately one week after leaving San Francisco, and providing stopovers at points of interest en route.

4. Return trip through the Pacific Northwest, Victoria, Vancouver and east via Canadian Pacific Railway, stopping at points of scenic interest en route, to occupy approximately one week.

5. Trip to Honolulu, sailing from San Francisco at 5 P. M. Friday, July 14, arriving at Honolulu Wednesday, July 19; leaving Honolulu Friday, July 28, and arriving San Francisco, Wednesday, August 2.

6. Trip to Alaska, sailing from Seattle and returning to Seattle. (No steamers for Alaska sail from San Francisco.) Schedules for the 1939 season are not at present available, but those interested will be furnished with definite information as soon as possible.

7. Return trip through the Panama Canal, sailing from San Francisco and arriving at New York. Schedules are not yet available for the 1939 season, but complete information will be furnished as soon as possible.

On the basis of the response to the above suggestions, plans will be formulated, and a more detailed announcement will appear in an early issue of the JOURNAL.

AMERICAN BAR ASSOCIATION
COMMITTEE ON ARRANGEMENTS
1140 N. Dearborn Street,
Chicago, Ill.

THE DALLAS INSTITUTE

SUPREME COURT MEMORIAL TO JUSTICE CARDOZO

—Harris and Ewing.

The chair which had been assigned to Justice Cardozo and the bench in front of it, was draped in black for a period of thirty days in accordance with the long standing custom of the Court.

He never occupied that chair, the assignment having been made during his last illness.

At the opening session of the Court for the October, 1938 Term the Chief Justice speaking on behalf of the Court rendered its tribute to his life and memory in the words quoted above.

IMPROVEMENT IN FEDERAL PROCEDURE FOR CORPORATE REORGANIZATIONS

Chandler Act a Noteworthy Contribution—Important Changes from 77B Include Appointment of Disinterested Trustees and Counsel, and Establishment of Securities and Exchange Commission as Standing "Amicus Curiae" to Aid the Courts—Qualified Administrative Agency Has Proper Place in Assisting Court in Reorganization Proceedings—Commisson Will Probably File Appearance In All Cases of Appreciable Size Where It Will Likely Undertake Preparation of Advisory Reports—Lawyer Is a Controlling Force in Entire Reorganization System and Has Had to Bear Brunt of Criticism Which at Times Has Been Justified—Commission Invites Cooperation of Bar in Rendering Genuine and Disinterested Service

By Hon. William O. Douglas
Chairman of the Securities and Exchange Commission

THE evolution of reorganization machinery has left the rehabilitation of corporations a matter for the courts, though alternative proposals have not been lacking. As much as twenty years ago a distinguished Federal judge observed that "There is a good deal to be said in favor of a new scheme of law which would in some way confer upon an impartial and disinterested tribunal the entire supervision of corporate reorganizations."[1] Our methods of reorganization remained, however, largely in direct line of descent from the equity receivership instituted upon a creditor's bill, the procedure commonly in use until the advent, in 1933 and 1934, of Sections 77 and 77B of the Bankruptcy Act.

Under those Sections, which provided a more effective mechanism than the equity receivership, reorganizations were still judicial matters, but the Sections worked material improvement in sundry technical aspects of the procedure. They gave legal sanction to reorganization proceedings directly initiated by debtor corporations, thereby eliminating the indirection and collusion usually incident to the friendly creditor's bill in equity. They promoted economy and efficiency in administration by making ancillary receiverships unnecessary. And by adapting the principle of bankruptcy compositions to corporate reorganizations, they rendered obsolete the foreclosure or judicial sale in equity, and made it possible to bind dissenting minorities to the terms of a reorganization which the court found to be fair. These were substantial gains in the technique of judicial administration of estates undergoing rehabilitation. It is worth emphasizing that all of these gains have been preserved, with only minor changes, in Chapter X of the recently enacted Chandler Act.[2]

In all of its aspects that Act, approved by the President on June 22, 1938, and fully effective on September 22, 1938, is a noteworthy contribution to the law of bankruptcy and corporate reorganizations. It is a sufficient token of its significance to the profession to point out that the Act represents the first thoroughgoing revision and amendment of the Bankruptcy Act since its passage in 1898. In Chapter X of the Chandler Act, the Congress has undertaken a clarification and revision of the former Section 77B of the Bankruptcy Act, at the same time fully preserving, as I have said above, the substantial improvements already accomplished by that Section. It is to Chapter X and its predecessor statute, Section 77B, that I address my comment in the paragraphs which follow.

Pursuant to a Congressional mandate,[3] the Securities and Exchange Commission four years ago undertook an intensive study of the problems of corporate reorganization. The Commission's examination necessarily involved both statistical studies and case history investigations of many reorganization proceedings under Section 77B. It held extended hearings upon a number of cases, and conferred widely upon the problems of reorganization with judges and lawyers, and with representatives of managements, underwriters, and bankers.

As a result of its studies of the extensive data which it had derived from the varied sources mentioned, the Commission came to the conclusion that a number of amendments and enlargements of Section 77B were both necessary and practicable; and recommendations for appropriate legislation were submitted to the Congress as directed by the law.[4] In collaboration with the National Bankruptcy Conference, a voluntary group representative of various bar, commercial law, referees' and credit men's associations, the Commission contributed to the preparation of Chapter X of the present Chandler Act, under the sponsorship of Representative Walter Chandler of the Judiciary Committee of the House of Representatives and Senator Joseph C. O'Mahoney of the Judiciary Committee of the Senate. Both Committees held extensive and informative hearings on the Act, in which all of its

1. Hough, J., in Guaranty Trust Co. v. International Typesetting Machine Co., S. D. N. Y., Feb. 19, 1916 (unreported).

2. Public No. 696, 75th Congress, 3d Session (H. R. 8046).

3. Securities Exchange Act of 1934, Section 211.

4. See Securities and Exchange Commission Report on the Study and Investigation of the Work, Activities, Personnel and Functions of Protective and Reorganization Committees, Part I (1937), at 897-907.

provisions were subjected to careful inquiry and their implications freely discussed. The resultant product is a carefully drafted Chapter reflecting fully an understanding of the needs of practical situations as well as an appreciation of the requirements of the public interest and of investors.

Even in purely formal respects Chapter X of the Chandler Act has improved upon Section 77B. The tortuous and involved paragraphs of the latter have given way to a series of short sections and articles, which are simpler to understand and to cite. Ambiguities and inconsistencies contained in Section 77B have been corrected; related concepts have been more logically arranged; and language and definitions have been clarified to a marked degree. But it is, of course, in its substantive provisions that Chapter X makes its major contribution. The extent of that contribution may be most readily grasped if these provisions and the reasons and objectives underlying them are here summarized briefly.

In the matter of initiation of proceedings, the Act, unlike Section 77B, permits indenture trustees to file a petition.[5] As the active representatives of bondholders, such trustees are thus in a position to protect more adequately the interests of the bondholders whom they represent. As to the place of filing of petitions, Chapter X has imposed practicable limitations upon "jurisdiction shopping" by deleting the Section 77B provision which made the state of incorporation as such a permissible venue in reorganization cases. Chapter X restricts the venue for the filing of an original petition in such cases to the court within whose jurisdiction there is to be found a corporation's principal place of business or its principal assets,[6] a requirement which, in addition to restricing the abuse previously mentioned, will in all probability be better suited to the convenience of creditors and stockholders.

Under Chapter X it is made clear that the court possesses, prior to its approval of a petition, the same powers which it would have in a bankruptcy proceeding before adjudication.[7] In removing the ambiguities of Section 77B with respect to this matter, the Chapter insures the court ample power to safeguard the corporate estate in the period between the filing of a petition and its approval or dismissal, which may at times last many months. In other ways, also, the court's jurisdiction is measurably strengthened and made more informed by the provisions, to be discussed subsequently in more detail, requiring the appointment of disinterested trustees,[8] the investigation and examination of the corporation's condition by such trustees,[9] the participation by the latter as the court's representative in the formulation and negotiation of plans of reorganization,[10] and the preparation by the Securities and Exchange Commission of advisory reports upon such plans for the use and advice of the court.[11]

The creditors and stockholders of a corporation undergoing reorganization, as the real owners of the enterprise, are given more appropriate recognition by Chapter X. Unlike the provisions of Section 77B, which limited their right to be heard to the questions of the permanent appointment of a trustee and the proposed confirmation of a plan, Chapter X grants them the right to be heard on all matters arising in the proceeding.[12] Joint activity on their part in the advocacy of their interests is encouraged by provisions calling for the assembling of security holders lists,[13] the use of which is insured to *bona fide* creditors and stockholders, and the abuse of which is minimized.[14] The limitations contained in Section 77B upon their power to suggest or propose reorganization plans have been largely removed.[15] And in connection with their voting upon plans, it is now required that they be provided with factual information adequate to ground an informed judgment.[16] In addition, they are to receive the opinion, if any, of the court on a plan and the advisory report, if any, of the Securities and Exchange Commission thereon, *before* they are asked to vote upon it.[17]

In its consideration of proposed reorganization plans the court is freed by Chapter X of impediments to the free exercise of its judgment imposed upon it by the practice under Section 77B. As a matter of general procedure under the Chapter, acceptances of a plan, or authorizations to accept it, are not to be solicited until after a hearing on a proposed plan, and its consideration and approval by the judge.[18] Thereby the court is relieved of the pressures in the past frequently placed upon its independent judgment by the ostensible acceptances of creditors and stockholders, which have made the court reluctant to upset reorganization plans they would otherwise reject as unfair. In addition, the court is given new powers with which to deal with those who unfairly obstruct the accomplishment of a reorganization, for claims or stock voted in bad faith may be disqualified by the court for the purpose of a vote on a plan.[19]

The Act directs the attention of the court to the desirablity of appropriately amortizing any secured indebtedness newly created under a reorganization plan.[20] It will prevent the issuance of non-voting stock by the reorganized corporation,[21] and similarly requires that the other terms of any new securities be fair and equitable.[22] It calls for adequate provision for periodic reports to investors, during the reorganization and after it.[23] It specifies the manner of preservation and enforcement of claims belonging to a debtor corporation which are not settled or adjusted in a plan.[24] In addition, the latter is required to contain equitable provisions with respect to the manner of selection of the persons who are to be directors, officers, or voting trustees of the reorganized company;[25] and the judge must, before confirming a plan, be satisfied that the identity, qualifications, and affiliations of the persons who are to be directors or officers or voting trustees upon the consummation of the plan have been fully disclosed, and that their appointment to or continuance in office is equitable and compatible with the interests of the creditors and stockholders, and consistent with

5. Section 126.
6. Section 128.
7. Section 112.
8. Section 156.
9. Section 167.
10. Sections 167, 169.
11. Section 172.
12. Section 206.
13. Section 164.
14. Section 166.
15. Sections 167(6); 169.
16. Section 175(4).
17. Sections 175(2); 175(3).
18. Section 176.
19. Section 203.
20. Section 216 (9).
21. Section 216(12)(a).
22. Section 216(12)(b)(1).
23. Sections 190, 216(12)(b)(2).
24. Section 216(13).
25. Section 216(11).

public policy.[26] These are salutary measures which should go far towards safeguarding the interests of investors.

In other miscellaneous respects, also, Chapter X of the Chandler Act improves upon Section 77B. To mention but a few: The provisions of the law relating to compensation and expenses, while they leave the grant of allowances a discretionary matter with the court, have resolved many of the ambiguities in 77B regarding the persons who may rightly claim allowances and the conditions upon which these may be granted.[27] In this connection, too, it is worth mentioning that the Chapter has codified the sound rule adopted under Section 77B by a number of courts,[28] which denies any allowance to persons who, in violation of their fiduciary position, buy or sell securities of the debtor corporation during the course of the reorganization proceedings.[29] Finally, in accordance with the fundamental objective of debt readjustments, the Chapter affords new income tax exemptions, in effect precluding tax assessments which might otherwise result from the reduction of indebtedness on the basis of a write-down in the valuation of a debtor's assets without an actual sale or exchange of such assets.[30]

Of these improvements in practice and procedure, the most basic relate to the provision for independent trustees[31] and to the advisory role of the Securities and Exchange Commission.[32] While these provisions are novel to Section 77B proceedings, their philosophy has found expression in the observations and analyses of students and critics of the former reorganization systems. And their counterparts or analogies are to be found in other legal procedures, as will be indicated at a subsequent point.

Section 77B of the Bankruptcy Act failed, as the equity receivership before it also failed, to meet the standards of thoroughness and efficiency in judicial administration. Neither fully recognized, nor paid strict heed to, the admonition of the United States Supreme Court that a receiver or trustee was "an officer of the court and should be as free from 'friendliness' to a party as should the court itself."[33] Under Section 77B it was not alone possible to have persons appointed as trustees though they completely lacked disinterestedness; in a majority of the cases it was the practice also to leave the debtor in possession and management of the corporation during the pendency of the reorganization. In this respect Section 77B had in effect sanctioned the very practice, in accentuated form, condemned by the Supreme Court.

The deficiencies of such a procedure have been demonstrated by the experience under Section 77B and under the equity receivership procedure. The likelihood is remote in such cases that real effort is made to discover and realize upon assets of the estate in the form of possible claims against management and its affiliated interests. The court lacks full and disinterested information concerning the debtor corporation, and lacking it is unable to exercise a fully informed judgment in the day-to-day administration of the case. In addition, no examination is made which adequately discloses all the essential facts required by creditors and stockholders as a basis for action by them upon a proposed plan; nor are they in a position, among other things, to gauge the quality of the management in order to determine whether it should be continued in office.

Chapter X of the Chandler Act requires the appointment of disinterested trustees—and disinterested counsel to such trustees—in the administration of any estate involving fixed and non-contingent indebtedness of $250,000 or more. Such trustee is empowered to retain the services of any of the officers of the debtor;[34] and an officer, director, or employee of the debtor may be appointed as a co-trustee for the purpose of aiding in the operation of the business.[35] In special or unusual cases this may be desirable, by virtue of peculiar knowledge or abilities indispensable to the operation of the corporation possessed by such officer, director, or employee; and the Chapter supplies flexibility in this regard.

A corporate reorganization, large or small, involves problems of corporate finance and management. It requires an inquiry into the causes of the financial collapse of the corporation. A determination must be made of how reorganization can best be accomplished upon a basis economically sound. As my colleague, Commissioner Frank, recently emphasized in an address at the Cleveland convention of the Association,[36] inquiry must be made, among other things, into general economic factors, competitive conditions and long and short term prospects in the industry, its trend of demand, and its price policies, as well as into more immediate questions such as involve the quality of the corporation's management. More narrowly, there will have to be an inquiry into and evaluation of past earnings of the particular enterprise and a conservative prediction made of future earnings, in order to determine a proper basis for value, capitalization and financial structure. These constitute the most important aspects of reorganization. And it is only after these broader economic and business issues are decided that attention can appropriately be given to questions concerning the extent of participations to be allocated among former security holders, the problem of the "fair plan" as traditionally understood.

The traditional concept of a court as a forum for settlement of sharply defined issues presented by the parties litigant, is inapplicable to reorganization proceedings, which are largely administrative in nature. As Mr. Justice Brandeis has said, the court in a reorganization case stands "in a position different from that which it occupies in ordinary litigation, where issues are to be determined solely upon such evidence as the contending parties choose to introduce."[37] "Every important determination by the court in receivership proceedings calls for an informed, independent judgment."[38] The parties litigant by accident, ignorance or design may not present to the court a comprehensive statement of the corporation's affairs. Their concern may relate only to a few of the many

26. Section 221(5).
27. Sections 241-248.
28. *Cf.* In re Paramount-Publix Corp., 12 F. Supp. 823 (S. D. N. Y. 1935).
29. Section 249.
30. Sections 268, 270.
31. Sections 156, 158.
32. Section 172.
33. Taft, C. J., in Harkin v. Brundage, 276 U. S. 36, at 55 (1928).
34. Section 191.
35. Section 156.
36. "Corporate Reorganizations and the Chandler Act," July 25, 1938.
37. First National Bank v. Flershem, 290 U. S. 504, at 525 (1934).
38. National Surety Co. v. Coriell, 289 U. S. 426, at 436 (1933).

problems which must be solved properly to effectuate a sound reorganization. Their background, knowledge, or approach may not lead them to an intelligent conception of the corporate picture. The parties litigant may not represent adequately, or at all, the numerous interests involved. Jointly, inadequate representation and inadequate information lead to unsound and unfair results.

One of the remedies contained in Chapter X of the Chandler Act is the provision for an independent trustee, mentioned above. Under the Chapter the trustee is required to make an investigation in every case into the facts pertinent to a solution of the problems I have mentioned.[39] His report will be available to the interested parties and their counsel before a plan is considered.[40] Certainly it is no departure from traditional concepts to require the trustee to make an investigation into the status and nature of the trust estate, to assist in a determination of the proper method of treatment of that *res*. The inventorying of estates is no new device. The Chandler Act does no more than clearly establish that duty, to be performed in a manner consistent with the larger needs of reorganization cases, and it provides express standards to guide the trustee in its performance, subject, for the most part, to the supervision of the court.[41] Such provisions should go a long way toward remedying a deficiency in reorganization procedure which has existed as long as that procedure itself: the lack of disinterested, expert advice to the court in the solution of the complex business and financial questions present in every reorganization.

The second measure adopted by Chapter X in this connection is the establishment of the Securities and Exchange Commission as a standing *"amicus curiae,"* to use one pertinent analogy, with the technical facilities of the Commission in business and financial matters at the constant and ready disposal of the Federal courts in reorganization cases. This expedient is likewise no departure from legal tradition, for innumerable instances can be adduced where the courts have made use of expert assistance in the solution of particularly complex problems. A simple example exists in what has been done in other situations where the facts of a case may be so complicated and involved that they are not readily intelligible to a jury. A court in such instances may refer the case to an auditor, to make preliminary investigations of the facts and report his findings to the court. The purpose in such cases is admittedly to simplify and clarify the issues; it is in aid and not in derogation of the judicial function.

The Commissioners on Uniform State Laws, to take another instance, have recommended an Uniform Expert Testimony Act which attempts to strike at the evil of biased and partisan expert evidence. A number of states have already adopted the Act. That Act provides, in cases where the opinion of experts is appropriate, for the appointment of experts by the court. And under the Act such experts may also be required to prepare reports on the matters within their special cognizance, and these reports may be read at the trial.

Nor are governmental administrative agencies strangers to such functions. In seeking, for example, to insure impartial assistance to trial courts adjudicating psychiatric issues in criminal proceedings, state legislatures have provided for court-appointed experts, or examinations by state institutions. In adoption cases references, mandatory and otherwise, to welfare boards or to permanent administrative adjuncts of the courts themselves, are becoming an integral part of the proceedings. Plenary administrative scrutiny and approval of reorganization plans has been provided under the Railroad Reorganization Act and under the Holding Company Act of 1935. Many other examples could be cited to complete the scale but little purpose would be served by multiplying these examples. A common thread relates all of them. Each is a practical procedure devised to meet the pressing need of the courts for an adequate machinery of analysis, investigation, examination, and report, upon which the courts may base an informed, independent judgment. The manner in which this assistance may be rendered follows no inflexible scheme; in each instance, as Commissioner Frank pointed out in the address to which I have referred, the particular device meets the test of effective accomplishment of the end which is sought.

In summary, there is ample corroboration for the belief that a qualified administrative agency has a proper and highly useful place in corporate reorganization proceedings. The grave burden imposed on the courts in the analysis of the fairness, equity and soundness of plans, the intricate financial and business questions involved, and the special knowledge required in their solution, make the facilities of a qualified administrative agency of particular value. Chapter X of the Chandler Act makes such facilities available to the court, and to the parties. Under Section 172 of the Act, it is provided that where a corporation's indebtedness exceeds $3,000,000, the judge will automatically refer the plans he deems worthy of consideration to the Securities and Exchange Commission for its examination and advisory report. In smaller cases the judge is privileged to submit such plans to the Commission. In addition, provision is made for active participation in the proceedings by the Commission, upon the invitation or with the approval of the court.[42] Such participation will enable the Commission to be of direct assistance to the court in the course of the proceedings, as well as serving to acquaint the Commission to the fullest extent possible with the problems of the particular case. For these reasons it is probable that the Commission will as a regular matter file a notice of its appearance in all cases of appreciable size, in which it is likely that it will undertake the preparation of an advisory report.

It is significant, I believe, that the potential usefulness of the kind of advisory role which the Chandler Act gives to the Commission, has already been given recognition by some courts. Over the past year the informal assistance and advice of the Commission has been sought in a number of cases by a few Federal District courts. These advisory functions will, of course, not be new to us, for by virtue of our duties under Section 11 of the Holding Company Act the Commission has gained a backlog of experience in the examination of reorganization plans. I emphasize, however, that the ultimate power and responsibility in reorganization proceedings under the Chandler Act are kept entirely in the hands of the court. The Commission shares no powers with the court; its reports are purely advisory; and its function is limited to furnishing the court with administrative assistance and advice.

It must be remembered that if the law cannot

39. Section 167.
40. Section 167(5).
41. Section 167.

42. Section 208.

adequately cope with the problem of effective rehabilitation of his investment, the investor makes small allowance for acts of God and the public enemy. He puts the blame upon the courts and upon the Bar, and the challenge can be met only by improvement in legal practice and procedure. Such has been the experience of the past decade in the field of corporate reorganizations. The Bar has had to bear the brunt of the criticisms, and at times, it must be admitted, the critics have been justified. For the quality of reorganization practices has in large measure been dependent upon the lawyer. His client,—whether the latter be trustee, receiver, debtor, underwriter, or protective committee—has required the lawyer to counsel him not only on what may lawfully be done but also on what may be wisely, properly and profitably done. The lawyer has done more than decide the forum for and method of reorganization. He has been in a position to determine the character and quality of administration of estates undergoing reorganization. He has been a focal point for the organization and activity of protective committees, and he has played an indispensable role in the formulation of their policies. Upon him in large part has depended the honesty, efficiency, and thoroughness of reorganization plans.

The lawyer is therefore, of necessity, a controlling and conditioning force in the entire reorganization system. The traditions of the profession make the lawyer peculiarly fitted for the exacting stewardship which reorganizations demand of the profession, and the Bar can be certain that there will be continued reliance upon it for such services. However, to some lawyers essaying multiple roles in reorganizations, the sharp lines drawn by the professional canons of ethics have in the past been blurred and indistinct. Not infrequently, for example, they have represented conflicting interests and, against the spirit, if not the letter, of the canon, have contended in behalf of one client for that which duty to another client required them to oppose. One provision of the Chandler Act was perhaps therefore to be expected, viz., that section which requires not only an independent trustee but also an "independent" lawyer for such trustee.[43]

There are a number of elements in the Chandler Act which should contribute greatly to real improvement in reorganization practice. Possessing perhaps greatest significance is the advance in reorganization procedure which Chapter X of the Act should accomplish. It is to this improvement in the judicial machinery, and the assistance for that purpose to be afforded by the Securities and Exchange Commission, that I have given primary emphasis in these paragraphs. For if in the past the problems of reorganization have been treated inadequately and inefficiently, it may be that the fault has been as much a result of defective legal machinery as of abusive use of that machinery. It is to the correction of these defects that Chapter X of the Chandler Act is principally addressed. But not to be overlooked is the assistance provided under the Act not only to the courts but to the Bar. In the experience of many reorganization practitioners, there are cases where the unavailability of adequate and accurate statements of facts and reliable financial analyses has seriously delayed completion of the work and affected the quality of the results. To the general practitioner, who may, further, be unfamiliar with the technique of reorganization and accordingly may find it difficult to evaluate properly such facts as do come to hand, the absence of easily accessible and thoroughly reliable information is a serious impediment to the proper representation of his client's interests. The new functions of the disinterested trustee, and the advisory opinions provided by the Act, should result in measurable benefits to the practitioner as well as to the courts. Lawyers, who will always be an essential cog in the machinery of reorganizations, should therefore be able to perform their functions more effectively.

On our part we aim to contribute intelligence and fairness in the solution of and advice upon the problems presented to us. We hope we can render a genuine and disinterested service. In that effort we invite and welcome the cooperation of the Bar. Through such cooperation investors can come to have greater faith in our reorganization procedure. By the same token we shall, jointly, have accomplished a long step forward in the improvement of our judicial machinery and have rendered a real service to the courts.

43. Section 157.

R. G. STOREY
Chairman, Section of Legal Education and Admissions to the Bar

THE REVISED BANKRUPTCY ACT OF 1938

Historical Background of the Act—Necessity of Laws for Reorganization and Rehabilitation of Business Enterprise Revealed by Depression—Framework of Original Act Retained But Important Alterations Made—Not Merely a Face-lifting Operation—77B Rewritten in Light of Experience—Major Changes Include Requirement for Appointment of Disinterested Trustee in Certain Cases—Provisions by Which Securities and Exchange Commission Can Become Party With Consent of Court, and Sections Giving Security Holders More Rights and Representation—Other Important Provisions of the Act

By Hon. Walter Chandler

of the Memphis, Tennessee, Bar, Member of the 75th Congress and Introducer of the Act in the House of Representatives

FROM time immemorial, Commerce has been one of the three great forces in the march of civilization, and the business relations of debtor and creditor have been the keystone of the arch of expansion within and among the nations of the world. Ancient and modern history alike are filled with records of codes seeking to create an ideal plan for the solution of the multitude of vexatious controversies which the paramount necessities of trade have made inevitable.

The legislative pendulum has oscillated from one theory to another as the imperfections of each were experienced in succession, and the pendulum will go on swinging, but such progress as has been made relates back to the dim distant past when human rights were not in bitter conflict with property rights.

Interestingly, the first recorded statute for the relief of an unfortunate debtor is found in the code of Hammurabi about 2300 years B. C.: "If anyone owe a debt for a loan, and the storm prostrate the grain, or the harvest fail, or the grain grow not for lack of water; in that year, he need not give his creditor any grain, he washes his debt tablet and pays no rent for this year." That benevolent principle also prevailed within the Tribes of Israel when outstanding debts were cancelled every seven years. As pointed out by Mr. Luther D. Swanstrom, of the Chicago Bar, in his new work on Corporate Reorganization: "Solon removed the mortgage pillars that covered most of the land of Greece and freed those in slavery for debt. He forbade contracts that put a debtor, his children or dependent relatives into bondage for debt." But with the advent of the Christian Era came the persistent notion that insolvency was a crime for which the offender should be thrown into prison. The Romans tried the stern corrective of imprisonment until they found that it did not pay, and it will astonish many today to know that as late as 1840 men were imprisoned for debt in some of the states of the American union.

The whole of these intolerable abuses has been swept away. Imprisonment for debt is gone, and in its place, the law of bankruptcy has passed through successive stages until modern business concepts have required the passage of laws to bring about the equitable distribution of assets of the insolvent debtor, the avoidance of preferences, the discharge of the bankrupt from his debts, and, lately, the reorganization and rehabilitation of the bankrupt's business for its continuance as a going concern, rather than liquidation, distribution, and stoppage of the business with consequent loss to debtors, creditors, employees and the public generally.

Well do we know that bankruptcy is neither a pleasant nor a profitable subject, but the legal principle is here to stay, and a brief review of the background of the 1938 amendments to the National Bankruptcy Act will serve to furnish a perspective by which the hopes and purposes of the new law may be made clear.

When America was settled, the leading idea of the law in England in the case of the ordinary insolvent was to seize his person. The principle of the law of bankruptcy with reference to a trader was to confiscate his property for the benefit of creditors. Quite naturally, therefore, the bankruptcy court was a terror to the honest insolvent; but to the evil-doer it afforded means of endlessly delaying his creditors, while the enormous expense of bankruptcy proceedings made it of interest to few creditors to carry on opposition except with the object of punishing the fraudulent or vexing the unfortunate. With the passing of time, however, and with the growth of national interest in business and economic stability, these misconceptions are disappearing. Indeed, bankruptcy and reorganization statutes have been pressed forward in each period of stress, and now, in response to that pressure, Congress has undertaken to meet a rather definite public demand for a new bankruptcy law after forty years of operation under the 1898 Act and amendments thereto.

When we think about it, the responsibility for a bankruptcy act is a continuing obligation of Congress because, under Clause 4 of Section 8 of Article I of the federal Constitution, Congress was given the power to pass uniform laws on the subject of bankruptcies, and in Article 10 of the Constitution, the states deprived themselves of the right to pass laws impairing the obligation of contracts. Therefore, the people have the right to ex-

pect Congress to keep bankruptcy legislation up to date, so that it will be adequate for changing social and economic conditions.

First Bankruptcy Act Passed in 1800

Of course, this responsibility always has become more pressing at or shortly after periods of depression; and we find that the first American bankruptcy act was passed in the year 1800, during John Adams' administration. That act was for the benefit of the creditor, was intended to continue in existence for five years, and primarily was to enable creditors to realize on the obligations of debtors by distribution of their assets, but the law was repealed after three years because the Federal Courts were unpopular, were too few and far between, very small dividends were paid to creditors, most of the debtors were already in prison for their debts, and the law was used by wealthy debtors to obtain discharges from their speculative obligations and resume operations afresh.

The second act, which followed the panic of 1837, was passed in 1841, in President Tyler's administration. It permitted both voluntary and involuntary proceedings, but was intended principally for oppressed debtors. Although bankruptcy is essentially an economic problem, the Act of 1841 was a creature of politics. The Whig Party sought the votes of suffering debtors, and the effect of the law was to arouse bitter opposition from creditors, who inveighed against extravagant administration of the law by the courts and their assignees. The Act of 1841 lasted little more than a year.

Congress passed, following the War between the States, the Bankruptcy Act of 1867. Intended as permanent legislation designed in the interest of the Nation as a whole rather than merely for individual debtors and creditors, it was materially amended in 1874, when the first composition provisions were inserted. This section furnishes the foundation for the new concept of bankruptcy, that is, the rehabilitation, reorganization and continuance of a man's business rather than its liquidation and distribution with the consequent loss of employment and without the possibility of recoupment. Like the other bankruptcy statutes, the 1867 law never became popular and was repealed in 1878.

Shortly after its repeal, however, agitation began for another general bankruptcy act, but twenty years were to pass before the Act of July 1, 1898, became a reality. By that time, all the constitutional questions which had arisen through the years had been settled or had disappeared, and that statute performed very well until outmoded by the passage of time and the acceleration of business. Rapid and far-reaching economic changes also made its inadequacies very apparent; and extensive investigations of bankruptcy frauds developed that the 1898 act was not still adapted to existing conditions, because of its slow-moving procedural machinery, the breakdown of creditor control, the large number of administrative duties thrust on the courts, and the domination of administration by attorneys.

A comprehensive investigation was had in New York City in 1929 under Judge Thatcher of the U. S. District Court, and by a committee of lawyers. Colonel William J. Donovan was chairman of the committee. Five remedies were recommended:

(1) There should be more prompt administration of the law;
(2) It should be on a more businesslike basis;
(3) The Courts should be relieved of administrative burdens;
(4) Creditor control in bankruptcy proceedings should be limited to cases of general creditor interest; and creditors' committees should be authorized to assist in the administration; and
(5) There should be stricter enforcement of the criminal and discharge provisions of the Act.

That investigation, as you who have read this new Act have seen, formed the basis of the study for the new statute. The Donovan report led to a nationwide survey by the Department of Justice, under Solicitor-General Thatcher (the same man who had presided over the investigation in New York City), and that survey resulted in the Hastings-Michener Bill, which was introduced and passed in the House of Representatives in the "lame duck" session of 1932. Representative Earl Michener, one of the authors of that bill, is still on the Bankruptcy committee in the House, and has had a very important and valuable part in the passage of the new Act. Knowing the subject thoroughly, he was of tremendous aid in working out the 1938 law.

Out of the hearings on the Hastings-Michener bill grew what is known as the National Bankruptcy Conference, a group of highly qualified people interested in obtaining the best possible bankruptcy law for the country as a whole. The membership, consisting of fifty or more outstanding lawyers, law teachers, accountants, bankers, legislators, economists, business men, judges, referees, textwriters, all schooled in bankruptcy law and procedure, labored diligently for six years to prepare the foundations and most of the superstructure of the new statute.

Necessity for Reorganization Laws Revealed

Meanwhile, the depression had revealed the imperative necessity of laws for the reorganization and rehabilitation of useful business enterprises rather than their liquidation and elimination, and the so-called debtor relief provisions, Sections 74, 75, 77, 77B and 80, came into being in 1933 and 1934. Experience under those sections developed the need for amendments, and the National Bankruptcy Conference broadened its studies to include this new and wholesome concept of bankruptcy law.

It is not important here to detail the steps of the legislation in the 74th and 75th Congresses, nor does time permit an analysis of the measure in the form in which it received the President's signature, but a summary of the more important changes is necessary to any understanding of the new law.

The framework of the original seventy-two sections of the Bankruptcy Act (except Section 12) was used for the structure, and exact phraseology has been continued wherever possible, with a view to retaining the benefits of the accumulation of interpretative law relating thereto. Wherever provisions have worked well, they have been retained, but each section has been analyzed to bring it into accord with the best features of present day business and commercial practices, and it cannot be

said that the re-write of the Bankruptcy Act is merely a face-lifting operation.

New and revised definitions have been incorporated, overlapping of the third and fourth Acts of Bankruptcy has been eliminated, and the fifth Act of Bankruptcy has been enlarged to curb receiverships which have been wasteful and inefficient and have resulted in heavy losses to creditors.

To increase efficiency in the administration of the bankruptcy law, time limits have been shortened throughout, expenses have been restricted, priorities minimized, creditors' committees have been authorized, ancillary receiverships are regulated in the interest of economy, and the sections relating to claims have been recast to remove existing deficiencies.

The qualifications of referees have been raised, their jurisdiction extended, and their duties enlarged, although their term of appointment has not been changed. Referees appointed after the law goes into effect must be members of the bar of the district and in good standing.

It was found advisable to add amendments clarifying the provisions covering the jurisdiction of bankruptcy courts pertaining, particularly, to suits by receivers, to the determination of dower interests, the closing of dormant estates, and the removal of bankruptcy trustees. A new clause has been inserted giving bankruptcy courts the needed power to regulate the administration of equity receiverships, assignments for the benefit of creditors, etc., when superseded by bankruptcy proceedings. Unquestionably, the number of plenary suits will be reduced, and the summary jurisdiction of referees has been extended very substantially.

Looking to improvement of the procedural sections of the Act, amendments have been inserted to permit the examination of hostile witnesses, to deal in an improved manner with proceedings for discovery, improve the practice on appeal, and toll statutes of limitation.

Experience has demonstrated that the criminal provisions of the bankruptcy law must be tightened in order to effect their purposes, and this has been done. Moreover, the necessity for minimizing evasions by bankrupts is being met by requiring the filing of schedules with petitions in voluntary cases, filing of statements of affairs, cost inventories, etc., the examination of bankrupts in all cases and their apprehension and extradition.

The domination of bankruptcy proceedings by the small claimants to the detriment of the majority of creditors, and the virtual control of the disposition of the bankrupt's estate by members of his family who hold claims have been dealt with by the curtailment of the voting power of these respective groups without impairing their rights as distributees.

While there are amendments restricting the acts of bankrupts who would thwart the purposes of the law, the bill recognizes that honest bankrupts are entitled to protection, as well as the full benefits of the statute. Accordingly, amendments have been included which eliminate the necessity for separate applications for discharge, provide for the payment of traveling expenses while attending examinations, and provide for the privilege of being examined out of the district by permission of the court. The preservation of the bankrupt's right to exemptions to the spouse or dependent children surviving at death is also an amendment in the interest of the bankrupt.

The discharge provisions of the Act have not been overlooked, because amendments have been proposed to require an examination of the bankrupt on every application for discharge, and the intervention of the United States Attorney by reason of the public interest in a bankrupt's discharge, as well as opposition by the trustee without authorization of creditors.

The highly technical provisions of the law relating to preferences, liens, and fraudulent conveyances, as well as the title of the trustee, have been simplified and clarified, and uniform rules have been made applicable to the liquidation of estates of bankrupt stockbrokers. The present unsatisfactory Section 67 has been revised so as to include condensed provisions of the Uniform Fraudulent Conveyance Act, now in effect in many states.

Changes Made Relating to Title of Trustee

A number of substantive modifications, additions and clarifying changes were made by Congress in Section 70, which relate to the title of the trustee to property of the bankrupt. The trustee's title has been related back to the date of the filing of the petition in bankruptcy and has been extended to certain rights, interests and estates which, within six months after bankruptcy, become assignable or transferable by the bankrupt or leviable by his creditors, or become vested in him, or give rise to powers in him to acquire an assignable interest or estate. The procedure and the rights and duties of a trustee with respect to the rejection of executory contracts (including unexpired leases of real property) have been specified and clearly defined. Furthermore, in Section 21 (f), the new Act provides that evidence of the trustee's title should be recorded in each county where the bankrupt owns or has an interest in real property, thereby protecting the title of the trustee as well as innocent purchasers. Careful study of Section 70 is advised wherever real property interests are involved in a bankruptcy proceeding, as a number of court decisions have been clarified by the changes in this important section.

The Senate and House Judiciary Committees took full cognizance of the experience under the English Bankruptcy Act and adopted several progressive principles which have worked well in other countries. New provisions broadening the proof and allowance of contingent claims extend that subject to the furthest point yet attempted, and the bankrupt is given a distinct benefit through the opportunity for release from claims hitherto not dischargeable.

Another outstanding provision of the pending bill is the partnership section, and the many defects of the present law on that subject have been remedied.

It should be emphasized that hundreds of court decisions were examined and wherever conflicts existed, they were reconciled by the adoption of the sounder rulings, and where hard cases made bad law, the statute has corrected the unsound conclusions of the courts.

Chapter VIII still contains Sections 75 and 77, the former dealing with the composition and extension of the debts of farmers and the latter with the reorganization of railroads. Chapter IX deals exclusively with the problem of the arrangement of

the debts of taxing districts and similar public corporations.

Section 12 of the Act of 1898 has been removed, and its general purposes have been incorporated into four separate chapters, Nos. X, XI, XII, and XIII, in order to enable the re-arrangement, composition, and extension of the obligations of corporations, small businesses, real estate equity holders, and wage earners. In writing these chapters, the expansive system of numbering sections has been adopted, and he who runs may read and understand them. Most of the large American corporations being publicly owned, the protection of the investors therein, and the preservation of useful enterprises giving large employment involve the public welfare and justify the special treatment accorded in Chapter X.

Chapter X of the New Law Relating to Reorganizations

The most controversial chapter of the new law is that dealing with the reorganization of private corporations, and, as it represents the highest attempted development of the ascending principle of constructive bankruptcy, and is of great importance to those engaged in the acquisition and sale of corporate securities, some mention should be made of its special features.

Passed in 1934, Section 77B was found to be sound in essentials and a probable fixture in the law, but experience in its operation developed the necessity for so many changes that the section was re-written entirely and is denominated Chapter X.

Several investigations were made by congressional committees and other agencies to determine the effect of the operation of Section 77B and to ascertain if abuses were prevalent. These investigations disclosed the following:

(1) Virtual control of reorganization proceedings by inside groups, resulting in the perpetuation of such control in the working out of reorganization plans and also in the corporation after reorganization;

(2) The failure of those in control to reveal and punish acts of corporate mismanagement or even more serious offenses;

(3) Inequitable reduction or elimination of minority investment interests; and

(4) The building up of large fees for counsel, trustees, and committees, and the obtaining of other special benefits not justified by any principle of equity.

Fortunately, for the draftsmen of Chapter X, Section 77B has been subjected to critical and searching analysis in the courts, and there is a large volume of case construction of almost every provision of the section.

The first major change in Chapter X is that requiring the appointment of a disinterested trustee in every case where a debtor corporation's scheduled liabilities are $250,000.00 or more. The court may appoint a disinterested trustee in all other cases or may leave the debtor in possession. In addition to the independent trustee in the smaller cases, the court is authorized to appoint an officer of the debtor as co-trustee, the purpose being to have the benefit of such officer's previous connection with and knowledge of the business.

In addition to the independent trustee, his attorney must be disinterested; and a disinterested person is defined, in substance, as one who was not an officer, director, employee, creditor, or stockholder of the corporation nor an underwriter of any of the secuirties during the preceding five years.

Under the direction of the court, the trustee is required to make such an examination of the affairs of the debtor corporation and the conduct of its business as will ascertain the reasons for the failure of the corporation, the probability of success in the event of reorganization, and all other facts that will be of value to the court in examining and passing on reorganization plans. In the formation and negotiation of plans for the reorganization of a distressed corporation, the trustee is the focal point. He assembles the facts necessary for the determination of the fairness of each proposal. He is the clearing-house for suggestions and is the driving force for the prompt preparation and submission to the court of the best obtainable plan.

Chapter X makes available to the court the facilities of the Securities and Exchange Commission in all cases. The commission must be called in for an advisory report where the scheduled indebtedness of the corporation is $3,000,000.00 or more, and in other cases the submission of plans of reorganization to the SEC is optional with the judge. Much opposition developed against this provision of the law, and the intervention of an administrative agency, sometimes styled a "court-policeman," into judicial proceedings was frowned upon as a step in the direction of moral control over the courts. It is believed, however, that those criticisms are not well founded.

So that the court may make an independent, considered judgment on the fairness of reorganization plans, and that creditors and stockholders may express their own opinions, freely formed, Chapter X prohibits the solicitation of assents to a plan until after the court has approved it for submission to them. Thus, the investor may determine for himself the fate of his investment and, however small his interest may be, he can be heard in court.

Requirements for Proper Plan of Reorganization Detailed

Of course, the essential section in the chapter is 216, which contains fourteen requirements for a proper plan of reorganization. The basic requirement is stated first and it is that a reorganization plan shall include with respect to creditors, and may include with respect to stockholders, provisions altering or modifying their rights, either through the issuance of new securities or by other means. The plan may deal with all or part of a debtor's property as well as specify what claims, if any, are to be paid in full. It shall provide for any class of creditors affected by, but which does not accept, the plan by the two-thirds majority in amount, and provide for stockholders similarly situated. Provision may be made for the rejection of executory contracts, and adequate provision must be stipulated regarding the selection of directors and officers.

An unusually interesting provision of Section 216 is subsection 9, dealing with the problem of long term indebtedness and its gradual elimination. There, considerable discussion arose relating to long term finance and credit policies. The definition of "credit" given by one who was a witness (Charles J. Banks, of Chicago) before the Judiciary Committee so attracted me that I wish to quote it

to you who deal with credit problems: "Credit to be sound should be paid back within the period within which its influence is felt in producing a distribution and turnover of goods and services." This premise seems logical, and its acceptance draws the inescapable conclusion that, with rare exceptions, the practice of long term financing is unsound. Certainly, the idea that as long as money could be borrowed it was smart to borrow it is a foolish concept, and I agree with the witness in his insistence that the true justification for business expansion is consumer-demand rather than availability of long term credit. We can not avoid the approaching end of the day when credit must be measured by the expected useful life of the security therefor.

The Senate amended Chapter X by requiring that the plan provide "for the inclusion in the charter of the debtor, or any corporation organized or to be organized for the purpose of carrying out the plan, of—

"(a) Provisions prohibiting the debtor or such corporation from issuing non-voting stock, and providing, as to the several classes of securities of the debtor or of such corporation possessing voting power, for the fair and equitable distribution of such power among such classes, including, in the case of any class of stock having a preference over other stock with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

"(b) (1) Provisions which are fair and equitable and in accordance with sound business and accounting practice, with respect to the terms, position, rights, and privileges of the several classes of securities of the debtor or of such corporation, including, without limiting the generality of the foregoing, provisions with respect to the issuance, acquisition, purchase, retirement or redemption of any such securities, and the declaration and payment of dividends thereon; and (2) in the case of a debtor whose indebtedness, liquidated as to amount and not contingent as to liability, is $250,000 or over, provisions with respect to the making, not less than once annually, of periodic reports to security holders which shall include profit and loss statements and balance sheets prepared in accordance with sound business and accounting practice: . . ."

Comment on this provision is unnecessary. The Senate simply felt that sound business practice required closer contact between a reorganized corporation and its security-holders than probably existed prior to the failure.

Every effort has been made to clarify conflicting and ambiguous provisions of Section 77B to reduce the fees and expenses of proceedings and bring about the confirmation of reorganization plans in a just and equitable manner; and, although bitter opposition persisted against Chapter X, even to the floor of the Senate, the sentiment now expressed in well informed circles is that Chapter X is feasible and workable and will prove to be efficacious and progressive.

Provisions for Real Property Arrangements by Others Than Corporations

Of special interest to lawyers who represent clients engaged in handling real estate mortgages and the instruments secured thereby is Chapter XII, which provides for real property arrangements by others than corporations. Congress recognized that arrangements affecting unsecured debts along with debts secured by real property or chattels real could not be brought successfully within the all-inclusive provisions of the Bankruptcy Act without serious complication of judicial machinery, and it was decided to include a separate chapter dealing with the settlement, satisfaction, or arrangement of debts secured by real estate owned by individuals or partners. The need for this special type of relief was called to the attention of Congress by the situation in metropolitan Chicago, where real estate securing widely distributed bond issues is commonly held by individuals rather than corporations. In view of the trend toward increased taxation of corporations, it was anticipated that individual ownership of real property securing bond issues may become more general throughout the country. Chapter XII, therefore, enables the adjustment of debts secured by real property as well as the unsecured debts of those who petition under the chapter.

The right is limited to the debtor, who may file an original petition or a petition in a pending bankruptcy proceeding if adjudication has not taken place. While the debtor is required to set forth in the petition the terms of his proposal, his creditors may submit a counter-proposal which, however, can not be confirmed unless it is accepted by the debtor. The filing of the petition operates as a stay of any act or proceeding to enforce a lien on the debtor's real property, thereby controlling pending foreclosure proceedings, pending action by the Court of Bankruptcy.

Chapter XII, in the main, is a composite of provisions in Chapters X and XI, and the scope of the relief has been made comprehensive and inclusive. The decision of the U. S. Circuit Court of Appeals in Re: Van Doren has been met by omitting the requirement in old Section 74 of the deposit of money or security prior to the filing of the application for confirmation of the plan. Under Section 437 of Chapter XII, the Court is given the power to fix, after the acceptance of the plan, the time within which deposits may be made for costs, taxes, expenses, etc. The acceptance must be by at least two-thirds in amount of claims of each class of creditors affected by the arrangement. The discharge of the debtor follows confirmation of the arrangement.

The chapter exempts from its provisions the creditors of a debtor under a mortgage insured by the National Housing Act, provides, through Senate amendment, against the extension or impairment of any obligation held by the Home Owners Loan Corporation or any Federal Home Loan Bank or member thereof, and makes inapplicable the provisions of Section 5 of the Securities Act.

Chapter XIII Designed to Reduce Number of Ordinary Bankruptcies

Time does not permit discussion of Chapter XIII, whose framework is similar to that of Chapter XI, except to state that, as the investigation conducted by the United States Department of Commerce in 1931 into the causes of bankruptcy among consumers revealed that bankruptcy of employees increased in number 414% during the period of 1920-1930, as compared with a population

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ATTORNEY GENERAL CUMMINGS' ADDRESS AT THE WASHINGTON INSTITUTE*

MR. MORRIS, Members of the Bench and Bar, Distinguished Guests on the platform and elsewhere throughout the audience, Ladies and Gentlemen: It is quite needless to say that it affords me infinite satisfaction to have an opportunity to be here and to welcome, if I may be permitted to extend a welcome, those who have gathered to take up the new, the neglected, studies of a generation.

We are embarking upon a great undertaking. The bar throughout the country, I think I may say with correctness, is more alive to its responsibilities and to its opportunities than it has been for a long time.

I have not come here to make a formal address. I have come to evince my interest in what is going forward and to express the hope that the advantages which it is assumed will come from gatherings of this kind will be abundantly realized. There are many such gatherings throughout the country, and it is a most encouraging sign. One can not help but express a feeling of extreme satisfaction, almost of self-congratulation, that so much progress has been made within the last few years, and especially in the last year, in connection with the improvement of the machinery of justice in our country.

If you will pardon a personal note, you will allow me, I am sure, to say that when I became Attorney General I was intensely interested in seeing how that great mechanism, the machinery of justice, operated, and how it could be made to function even more successfully, how it might serve in a wider and more intimate fashion the needs of a great and growing and vital people. I undertake to say that in the hearts of all people, men and women throughout our country, there is a longing for justice and a desire to approach more nearly to the sources of right.

Such studies as I was able to give to the problem indicated many lines of approach which would permit us to so remold the machinery of justice that these ideals might be realized. Of course the immediate problem with which I had to deal was the problem growing out of interstate crime. That made it necessary to prepare and seek the passage of a large number of statutes dealing with matters of substance and matters of procedure in the criminal field. I need not pause to discuss that matter in detail, because it lies easily within the memory of all of you who are listening to me today.

The next matter that seemed pressingly important was the one of civil procedure. I was, of course, aware of the long struggle that the American Bar Association had made to secure the rule-making power for the Supreme Court, and I was aware, too, that that struggle had been abandoned in a moment of discouragement at Grand Rapids in 1933, after twenty-five years of effort. It seemed to me well worth while to renew that struggle; and so the Bill was redrafted and introduced in Congress. If you will permit me to say so, one of the reasons that I was able to secure the passage of that Act was because I am something of a politician. I took stock of what had occurred before, and I found that the committees having the matter in charge had been approached by very dignified groups of lawyers, who, appearing before these committees, rather talked down as if from on high to those who were supposed to pass upon the wisdom of the passage of the law. So I thought I wouldn't have any committees at all. I went up there alone, unarmed, relatively innocent, and yet with some degree of experience in the matter of dealing with men. I used all the arguments I could think of, good arguments, bad arguments, threats, and personal appeals. Eventually the opposition disappeared, and the Act reached a stage where it could be passed in the House if there were no objections. It had reached that critical stage where one voice raised against it would destroy the entire project.

I recall one member of the Committee who was very obstinate and difficult. He told me that he had made speeches against the idea in his district; that it was a matter of principle with him, and that he would have to object. He assumed that it was something new and strange, and new things scare many people even if they are good things. I argued with that man for hours, and finally we compromised. I agreed to go on with the bill, and he agreed to abide by his principles but would absent himself from the House the day the matter came up.

The net result was that the Bill went through swimmingly and for a long period after that the Supreme Court was engaged, through appropriate committees which the Justice Department helped as best it could, in drafting the new rules. They were not drafted hastily, as you know. They were a result of very careful research; they were the result of questionnaires sent out to judges and eminent lawyers and law groups everywhere. The best that could be found in the practice of the various states was drawn into this new procedure, and finally at the opening of the session (the last session) I had the privilege of presenting the new rules to the Congress.

Well, it was necessary to protect the rules after they had been submitted, because new attacks were made upon them. Bills were offered to postpone the effective date, and it required considerable effort and some little ingenuity to see that no harm came to the structure that had thus been carefully erected. So we passed the danger point, and on the sixteenth of September the new rules came into effect. They are simple, they are easily understood, and one of the by-products of the new rules has been that it has set the lawyers once more to studying law.

You know, the study of procedure to ascertain how to handle a particular case is such that we, as lawyers, are apt to examine the rules with microscopes to determine exactly how our case may best be conducted. But now we have the phenomenon of lawyers throughout America studying the rules not merely with reference to a particular case but with reference to the vital structure of the machinery of justice itself, and that, I take it, is a great thing in itself.

There are many other things that have been

*Attorney General Cummings presided at the opening session of the legal institute on the New Rules of Civil Procedure for the District Courts of the United States, held by the American Bar Association in Washington, D. C., on October 6-8. He was introduced by Mr. George Maurice Morris, Chairman of the Arrangements Committee.

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achieved aside from the passage of these new rules. The exasperating delays in the courts have been a problem that has vexed students of the subject for a long time. Amongst the remedies suggested has been the addition of judges to the bench, so that there might be an augmented personnel to deal with the great mass of undigested cases which are perpetually upon the docket and against which we make no substantial headway year after year. With the new rules, with added judges, and I hope some day with administrative machinery, we shall be able to reassert, as we ought to reassert, the mastery by the legal profession, on the bench and at the bar, of the processes by which litigation is conducted in the courts. That is our problem; that is our responsibility.

Those of you who have read the report of the Judicial Conference which has just been concluded have been gratified, I am sure, to note how far that Conference has gone in forwarding ideas of this character. There are other things that need to be done. I have been privileged to suggest that the rule-making power granted to the Supreme Court in certain types of civil cases should be extended to the Supreme Court in connection with criminal procedure prior to verdict. Ultimately, we must confide in the high tribunal the rule-making power in connection with all aspects of litigation, so that there may be a possibility of bringing about unity in the entire structure. These are ideals toward which we are moving.

If the civil rules which we are here to study can be made to succeed (and I have no doubt that they will succeed) so that they give satisfaction to the bench, to the bar, and to those sometimes forgotten people, the unfortunate litigants, then we will have achieved something that will make us proud of the profession to which we belong.

So it is extraordinarily gratifying to see this very large number of people gathered here, not as critics but as students; not as attorneys representing individual clients, but as lawyers concerned with the progress of the profession and the betterment of the processes of justice.

NOMINATION AND ELECTION OF STATE DELEGATES IN 1939

The following states will elect a State Delegate for a three-year term in 1939:

Arizona	Maine	Oklahoma
Connecticut	Michigan	South Carolina
District of Columbia	Mississippi	South Dakota
	Montana	Texas
Illinois	Nebraska	Washington
Iowa	New Jersey	Wyoming

Nominating petitions must be filed with the Board of Elections not later than February 10, 1939. Forms of nominating petitions may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. Nominating petitions, in order to be timely, must actually be received at the headquarters of the Association before the close of business at 5:00 P. M., February 10, 1939.

Attention is called to Section 5, Article V, of the Constitution, which provides:

"Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group)."

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default for the payment of dues is not a member in good standing.

Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Ballots will be mailed to the members accredited to the states, in which elections are to be held, within thirty days after the time for filing nominating petitions expires.

EDWARD T. FAIRCHILD,
Chairman of the Board of Elections

FEDERAL RULES INSTITUTES ENJOYING WIDE-SPREAD POPULARITY

NO activity of the organized Bar in recent years has been so enthusiastically greeted by practicing lawyers as the legal institutes on the new Rules of Federal Procedure, which are being given in many parts of the country. The institute on this subject which was given by the American Bar Association in Cleveland for three days before the opening of the Annual Meeting, seemed to be an example and to furnish an incentive for many like gatherings from one end of the country to the other. The success at Cleveland has been duplicated and even surpassed. As an example of the activity in this field, on the last week end in September an institute in St. Louis, prior to the opening of the annual convention of the Missouri State Bar Association, attracted 650 lawyers, a meeting in Atlanta for lawyers in the southeastern States had a registration of 633, while a Birmingham institute reported an audience of 350. The following week, while Professor Sunderland was lecturing to 500 lawyers in Dallas, other members of the Advisory Committee and additional lecturers from the judiciary, the teaching profession and the practicing bar, were addressing an audience at Washington, which at some sessions included over 900 lawyers. The largest meeting on this subject which has yet been held, and probably the largest gathering of lawyers ever to assemble for the purpose of study of any subject in either the procedural or substantive law fields, met in New York City on October 17, 18 and 19, at an institute conducted jointly by the Association of the Bar of the City of New York and the New York County Lawyers Association for their membership. The total registration for this institute was in the neighborhood of 2,000. Dean Charles E. Clark, the Reporter of the Advisory Commitee, estimates that he has already addressed not less than 5,000 lawyers in different parts of the country on this subject. A partial list of Federal Rules Institutes, not including speeches on the subject delivered at State and local Bar Association meetings, includes the following:

List of Institutes on the Federal Rules

Kansas City, May, 1938.
Chapel Hill, N. C., July.
Cleveland, July 21-23.
Seattle, Sept. 12, 15, 19 and 21.
Detroit, Sept. 14 15 and 16.
Louisville, Sept. 15, 16.
Pittsburgh, Sept. 16.
Birmingham, Sept. 28, 29.
St. Louis, Sept. 29.
Atlanta, Sept. 30, Oct. 1.
Washington, D. C., Oct. 6, 7 and 8.
Dallas, Oct. 7-8.
New York, Oct. 17, 18 and 19.
Knoxville, Oct. 28, 29.
San Antonio, Nov. 4.
Cincinnati, Dec. 10.

Institutes or series of lectures concerning which more complete information is not at hand have either been held or are being planned in the following cities: Toledo (series of lectures commenced in October), Chicago, Dayton, Wichita, San Francisco, Los Angeles, Newark, New Orleans and Brooklyn.

Speakers at these institute meetings have included the following members of the Supreme Court Advisory Committee: William D. Mitchell, New York; Edgar B. Tolman, Chicago; Dean Charles E. Clark, New Haven, Connecticut; Professor Edson R. Sunderland, Ann Arbor, Michigan; Judge George Donworth, Seattle; Robert G. Dodge, Boston, and Monte M. Lemann, New Orleans. Other speakers are Judge John J. Parker of the U. S. Circuit Court of Appeals for the Fourth Circuit, Judge Joseph C. Hutcheson, Jr., of the U. S. Circuit Court of Appeals for the Fifth Circuit, Judge Oscar R. Luhring of the U. S. District Court for the District of Columbia, Judge W. Calvin Chesnut of the U. S. District Court of Maryland, Judge E. Marvin Underwood of the United States District Court of Georgia, Northern District, Judge Arthur F. Lederle of the U. S. District Court of Michigan, Eastern District, Professor William W. Dawson of the Western Reserve University Law School, editor of the published volume of Proceedings of the Cleveland Institute, Professor Harry L. Shulman of Yale Law School, Thomas G. Long, Detroit, Frank M. Drake, Louisville, W. Q. Van Cott, Salt Lake City, Gustavus Ohlinger of Toledo and, from the patent bar, Nathan Heard of Boston and William S. Hodges of Washington.

It will be appreciated if information concerning other institutes on this subject, not here listed, is sent to the JOURNAL.

The Atlanta Institute

The Atlanta Institute, which was held on September 30-October 1, was organized and directed by Mr. E. Smythe Gambrell, of that city. It was sponsored by the Atlanta Bar Association in cooperation with the Lamar School of Law of Emory University, associate sponsors being the Lawyers Club of Atlanta, the Georgia Bar Association, the Lumpkin School of Law of the University of Georgia, and the Law School of Mercer University. All members of the bench and bar and all law students in Georgia, Alabama, Florida, South Carolina, Tennessee and other southeastern States were invited to attend and many lawyers outside of Atlanta accepted the invitation. The speakers included Mr. Monte M. Lemann of New Orleans and Dean Clark of Yale, both members of the Advisory Committee, Hon. Joseph C. Hutcheson, Jr., member of the United States Circuit Court of Appeals, Fifth Circuit, and Hon. E. Marvin Underwood of Atlanta, Judge of the United States District Court. The Institute consisted of three sessions, Friday morning, Friday afternoon, and Saturday morning. President Frank J. Hogan of the American Bar Association was the guest of honor and principal speaker at a banquet given Friday night by the Atlanta Bar Association and Lawyers Club of Atlanta. The registration at the Institute was 633. Mr. Gambrell reports this is the largest number of

lawyers to assemble, within his knowledge, in the southeastern states.

The Washington Institute

Close to half of the lawyers engaged in active practice in the courts of the District of Columbia, according to the estimate of Arrangements Committee Chairman George Maurice Morris, packed to overflowing the large hall of the United States Chamber of Commerce in Washington when Attorney General Cummings was introduced to preside over the first session on October 6 of the three-day Institute on Federal Rules arranged by the Legal Education Section of the American Bar Association in cooperation with seven other bar associations. Total registration of more than 950 furnished renewed evidence of the eagerness of the bar for opportunity to hear recognized authorities on subjects which concern their daily practice.

The enthusiasm of the District bench and bar and of the one hundred and twenty-five lawyers from seventeen states outside the District who attended, was maintained at a high level throughout the three days of lectures and until the final words of Justice Oscar R. Luhring, of the United States District Court for the District of Columbia, the last speaker on the program.

It is noteworthy that the District lawyers could "take it." Morning and afternoon sessions for three days failed to diminish their zeal, and the auditorium, which holds over eight hundred people, was still full on Saturday afternoon, despite the competition of woods and hills and the call of golf and football. An ante-room, provided with a loud speaker connected with the auditorium, took care of the overflow which sometimes reached a total of as many as a hundred listeners, and permitted an invitation to be extended to law students of the District on the last day to hear, without cost, a discussion of some of the rules and particularly of the local rules of the District Court.

Cooperation of the judges of the local United States District Court and the Court of Appeals was an important factor in making the lectures a success. Both courts adjourned during the Institute and many of the judges were in constant attendance throughout the sessions, Chief Justice Groner of the latter court and Chief Justice Wheat of the former both presiding in the course of the program. The Department of Justice furnished two presiding officers—Attorney General Cummings, who opened the sessions, and Assistant Solicitor General Golden Bell, who presided on the second afternoon. Hon. W. Calvin Chesnut of the United States District Court of Maryland and Joseph W. Henderson, Esq., of Philadelphia, member of the Board of Governors from the Third Circuit, also wielded the chairman's gavel at regular sessions, and Mr. Thomas E. Robertson of the local bar, Chairman of the Patent Section, presided at the evening seminar on patent law. Speakers included Edgar B. Tolman, Esq., member and Secretary of the Supreme Court Advisory Committee; Dean Charles E. Clark of the Yale Law School, Reporter and member of the Advisory Committee; Mr. Robert G. Dodge of Boston and Judge George Donworth of Seattle, members of the Advisory Committee; Professor William W. Dawson of Western Reserve University Law School, and Justice Oscar R. Luhring of the District Court of the United States for the District of Columbia.

On Friday night a seminar was held on questions of particular interest to patent lawyers, the speakers being Mr. Thomas E. Robertson, Chairman of the Section of Patent, Trade-Mark and Copyright Law of the American Bar Association, who presided; Mr. Nathan Heard of Boston and Mr. William S. Hodges of Washington. The audience included a number of examiners and other officials from the patent office, as well as members of the patent bar from New York, Chicago, Philadelphia, Washington and other cities.

Cooperating bar associations which did effective work in promoting the institute included the Bar Association of the District of Columbia, Women's Bar Association of the District of Columbia, the Federal Bar Association, the Bar Association

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of Baltimore City, the Alexandria City Bar Association, Virginia State Bar Association, Maryland State Bar Association, and the American Patent Law Association. Mr. George Maurice Morris, former Chairman of the House of Delegates of the American Bar Association, was the Chairman of the Arrangements Committee, and Mr. Herbert M. Bingham of the Washington bar was the secretary. Mr. Morris introduced the presiding officers and closed the meeting. The program was as follows:

Thursday, October 6, 1938, 10:00 a. m.

Opening Statement—George Maurice Morris, Chairman Committee on Arrangements.

Presiding—Hon. Homer S. Cummings, The Attorney General.

Federal Procedure 1789-1938.

Rule 1, Scope of Rules; 81, Applicability; 2, One form of Action; 3, Commencement of Action; 4, Process; 5, Filing and Service; 6, Computation of time.

MR. EDGAR B. TOLMAN,
Member and Secretary of the Supreme Court Advisory Committee

2:00 p. m.—Presiding—Hon. D. Lawrence Groner, Chief Justice, United States Court of Appeals for the District of Columbia.

Rules 7-25, Pleadings, Motions, Defenses, Third Party Practice, Joinder of Claims and Parties, Class Actions, Intervention and Interpleader.

DEAN CHARLES E. CLARK,
Reporter to the Advisory Committee

Friday, October 7, 1938, 10:00 a. m.

Presiding—Hon. W. Calvin Chesnut, Judge of the United States District Court for the District of Maryland, who will discuss the Subject of Trials and Pretrial Procedure.

Rules 26-37, Depositions and Discovery.

PROFESSOR WILLIAM W. DAWSON,
Western Reserve University Law School, Cleveland, Ohio

2:00 p. m.—Presiding—Hon. Golden W. Bell, The Assistant Solicitor General.

Rules 37-52, Trials, Evidence, Official Record, Jurors, Special Verdicts, Instructions, Findings.

MR. EDGAR B. TOLMAN,
Member and Secretary of the Supreme Court Advisory Committee

Seminar: 8:00 p. m.

Presiding—Mr. Thomas E. Robertson, Chairman Section of Patent, Trade-Mark and Copyright Law of the American Bar Association.

A discussion of questions arising under the new Rules in patent litigation will be led by Mr. Nathan Heard of Boston and Mr. William S. Hodges of Washington.

Saturday, October 8, 1938, 10:00 a. m.

Presiding—Mr. Joseph W. Henderson, member of the Board of Governors of the American Bar Association from the Third Circuit.

Rule 53, Masters; 54-63, Judgments, Defaults, Summary Judgment, Declaratory Judgment, New Trials, Relief from Judgment, Stay of Proceedings, Disability of a Judge.

MR. ROBERT G. DODGE,
Member of the Supreme Court Advisory Committee

2:00 p. m.—Presiding—Hon. Alfred A. Wheat, Chief Justice, District Court of the United States for the District of Columbia.

Rules 72-86, Appeals, District Courts and Clerks, Stenographers, Rules, Forms, et. cetera.

JUDGE GEORGE DONWORTH,
Member of the Supreme Court Advisory Committee

The new District Court Rules and Procedural Provisions of special interest to the District of Columbia Bar.

JUSTICE OSCAR R. LUHRING,
District Court of the United States for the District of Columbia

Washington Proceedings Also To Be Furnished to Cleveland Registrants

The proceedings of the Washington Institute together with the proceedings of the New York meeting, referred to hereafter, will be published by the American Bar Association as a supplement to the Cleveland book, and will be distributed to those who registered at Washington and put on sale for the benefit of others. They will also be distributed without additional charge to all those who registered for the Cleveland Institute. Duplication of material included in the printed volume of the Cleveland Institute will be avoided and cross-references to the Cleveland proceedings will be included. The opening remarks of the Attorney General at Washington are printed elsewhere in this issue.

Approximately 5,000 volumes of the Cleveland proceedings have already been disposed of, and it is anticipated that there will be a continuing demand from the bar both for this volume and for the Washington and New York proceedings. The value of these books is indicated by the fact that the Attorney General has already supplied every United States District judge, every United States attorney and every member of the Department of Justice legal staff with copies of the Cleveland book and expects to do the same with the supplement when it is published. It is apparent that every lawyer who practices in the federal courts would do well to equip himself with this valuable material.

The New York Symposium

Old residents of Manhattan refuse to travel for the reason that "sooner or later all the attractions come to New York." This view was confirmed on October 17, 1938, when the New York Symposium on the Federal Rules of Civil Procedure got under way with the same six members of the Supreme Court's Advisory Committee as speakers who had graced the dais at Cleveland.

The New York Institute, or Symposium as it was called, was held under the auspices of The Association of the Bar of the City of New York and of the New York County Lawyers' Association. There was no registration fee, the original intention being to hold the meetings partly at the hall of the former and partly in the building of the latter association. Because two thousand applied for tickets, however, it was decided to transfer the meetings to the Auditorum of the College of the City of New York, 23rd Street and Lexington Avenue.

The assembly was welcomed by the Honorable Charles H. Tuttle, Chairman of the Board of Trustees of the college, and the members of the Advisory Committee were then greeted by the Honorabl George Z. Medalie, formerly United States Attorney and now president of the New York County Lawyers' Association, and by John Kirkland Clark, Esq., vice-president of The Association of the Bar. The meetings were presided over alternately by Harold Harper, Chairman of the County Lawyers' Committee on Federal Courts, and by Cloyd Laporte, Chairman of the Bar Association's Committee on Federal Legislation.

William D. Mitchell, Chairman of the Advisory Committee, was the first speaker, giving the history of the new rules and explaining the methods of the

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Advisory Committee. He pleaded for an interpretation of the new rules which would get away from the precise formalism of previous codes of practice and expressed the fear that there might be a tendency to restore the older practice through the power given to District Courts to make supplemental rules under Rule 83.

New York lawyers were surprised to find Dean Charles E. Clark of the Yale Law School and Professor Edson R. Sunderland of the Michigan Law School, who followed, evidencing a knowledge of their own state procedure, which they had previously thought could only be acquired by practice in the state. Both of these speakers showed that the Advisory Committee had borrowed freely from the more liberal provisions of the New York Civil Practice Act and had afforded even broader provisions for joinder of parties and for discovery.

Major Edgar B. Tolman, Secretary and member of the Committee, brought to the fore the flexibility which the rules gave to the court in the use of the jury and in the separation and consolidation of issues.

Use of Auditor Under Massachusetts Practice

Robert G. Dodge, of Boston, initiated the audience into the possibilities of the use of the auditor under the Massachusetts practice, pointing out that this official was one of the types of master that might be appointed under Rule 53.

The audience was very sensible of the honor done it by the Honorable George Donworth, formerly United States District Judge for the Western District of Washington, who had come from Seattle to address the meeting. His time was largely devoted to the answering of the many scribbled questions which had reached the dais. Members had been specially requested to submit their questions in advance in writing. They were then assigned to the speaker on the rule involved, and it was thought that this resulted in more considerate replies and greatly expedited that portion of the discussion.

In one of the most interesting sessions Chairman Mitchell dealt with the subject of appeals.

The symposium closed with appropriate resolutions which attested the general pleasure and profit of the audience.

The many new points raised and answered by the Committee are to be included in the printed volume which will contain the proceedings of the Washington institute, from which material already in the book of the Cleveland proceedings will also be eliminated.

The Dallas Institute

During the same time that the Washington Institute was being held, Professor Edson R. Sunderland, of the University of Michigan Law School, was lecturing to the Dallas bar. His lectures were delivered on Friday afternoon and Saturday morning in the Palm Garden of the Adolphus Hotel to a capacity crowd of about 500. Judges of the State and federal courts and the clerks of the federal courts were guests of the Dallas bar. Saturday, October 8, was designated as Lawyers' Day at the Texas State Fair and a number of out of town lawyers attended both the institute and the fair. The institute committee consisted of R. G. Storey, Chairman, who is also chairman of the Legal Education Section of the American Bar Association; Roy Ledbetter, delegate of the Dallas Bar Association to the House of Delegates, and Lewis Lefkowitz. This is the second institute to be staged by the Dallas association and it is proposed to continue them as a part of the regular annual program.

Institutes Part of Section Program

It is a part of the general program of the Legal Education Section to illustrate the value of the institute idea and to encourage and assist local bar associations in providing advanced legal education for their members. The new federal rules have offered a most opportune and popular subject for this type of service to the practicing bar. A demand is manifesting itself for similar service in regard to the new bankruptcy Act. The Section will be glad to assist any association which desires to arrange an institute on the new federal rules or upon any other subject.

THE PROFESSOR SOLILOQUIZES ON FACT-FINDING BOARDS AND THE RULES OF EVIDENCE

If Rules of Evidence Impose Reasonable Limitations They Should Be Applied, But Not if They Operate to Hamper—Present Rules of Evidence Are a Conglomerate Mass, Not a System—They Were Evolved for the Jury System on Assumption that Jury is Inexpert—Fact-finding Board Has Time to Acquire Knowledge and Experience—Does Not Need the Protection of the Rules and Would Be Hindered by Their Complications — Ultimate Protection Against Error Should Not Come from Enormous Set of Rules but from Preservation of Right of Appeal*

By John L. Seymour
of the Wilmington, Delaware, Bar

THE Professor strode into my den, flung his hat and coat beside mine, seized my glass, "What's in it?"

His entry and his voice, both robust, exploded the air castles of a very pleasant reverie like high explosive shells in a chateau. I regarded him without enthusiasm and said, somewhat sourly:

"The evidence is before you."

"Yes," he replied, more robustly, "but if I were to testify to it in court, you would call upon the Rules of Evidence to exclude my statement as a mere speculation or because I had not been properly qualified as an expert. Which proves, my fine feathered classicist, that the Rules are no such product of Divine inspiration as you would have the humble scholar believe. I would not breathe that blasphemy in the sacred halls of the law school, for in the halls of the law school, whether sacred or profane, the decisions that founded the Rules are an absolute necessity. They teach the glowing young mind to think, introduce order where confusion previously had reigned and bless the diligent worshipper by floating him over the bar."

He went to the sideboard, assembled several bottles, some fruits, cutlery, and five glasses, filled each of the five glasses with ice cubes and equal portions of the various ingredients, gently stirred the first and began pacing up and down the room. Presently being annoyed by the necessity of reversing his course at either end of the room, he commenced walking around and around the table. his left hand hooked into his belt beneath the back of his coat and his right gesticulating with the loaded glass to emphasize his points.

"The principal use of Rules of Evidence," he continued, "should not be in the instruction of schoolboys, but in inducting a judicial tribunal into the office of truth. You insist that they do so; nay, you go further and claim that without them error flourisheth and the night of tyranny falls upon the land. Yours is a narrow point of view and, while I shall deny what you say, I who have studied the systems of the Civil, Roman and Canon law, maintain that the subject at least requires examination: The increasing number of fact-finding boards (administrative tribunals, call them what you will) which fill the land and unburden the judges, which act by law but form no part of the judicial system itself, forces us to consider whether they shall be bound by the Rules of Evidence. Now the verb to bound means to circumscribe, to limit, to restrict and it is doubtless true that to bound a board with safeguards is unobjectionable if the boundaries exclude error without excluding accuracy. Otherwise the bounds become bonds, and we realize that 'bound' is not part of an infinitive, but the past tense of the verb 'to bind,' which means to tie up. If the Rules of Evidence as applied to fact-finding boards impose mere reasonable limitations, it is desirable that they be applied, but if they operate to restrict and hamper, they should be eliminated.

"There is an intermediate ground where their effect is indefinite, neither good nor bad, in which case we shall apply the logic of the Mohammedan general who burned the Alexandrian library: 'Why not burn it?' he asked the citizenry, 'If the contents are contrary to the Koran, they are pernicious, and if they agree, they are superfluous.'

"It is maintained by all apologists for the common law Rules of Evidence that they are not only a good system for simplifying a trial, for obviating the possibility of error, and for determining the truth, but that they are the only system. It is maintained that without them the tribunal would be overwhelmed with such masses of evidence that its decision would resemble a divination rather than a conclusion, and so forceful is that argument, so filled with seeming truth that even those lawyers who doubt that the Rules simplify the trial or eliminate error, and who would otherwise do away with them, concede that they are the only system and cling to them for lack of any other.

"They admit it, but it is not true. The Rules are logical, but the rules are not a logical system. Why? Because the Rules are not a system. Ten rules, regardless of their individual quantum of logic, do not make a system unless they are related

*An essay submitted in the 1938 Essay Contest conducted by the American Bar Association pursuant to terms of bequest of Judge Erskine M. Ross, deceased, on the subject "The Extent to which Fact-finding Boards Should be Bound by Rules of Evidence."

to each other in progression, unless each rule depends on each preceding rule for a part of its meaning and its force. A system of rules is found in Geometry; wherein you first define a point, define a line by a point, define a plane by a line, a solid by a plane, and thence build up a pyramid more lasting than Gizeh, each step of which rests upon the step preceding. That is a system.

"Is a system found in the Rules of Evidence? It is not. They are a conglomerate mass, the spawn of centuries. Attempts have been made by lawyers to give system to that conglomerate mass, but the results have been only to group together the decisions relating to general classes. Henry James would have called the result of that effort 'a little analysis on a general plane,' which would be an understatement because it is a lot of analysis, and an exaggeration because it is certainly not plain. The colossal nature of the task and the result is shown by Wigmore's work on evidence, which contains about six thousand pages in six bulky volumes. Now, believe me, six bulky volumes are not required to set down any subject that has been systematized. To call such a compilation of Rules of system, whether analyzed and segregated or not, is an abuse of the term. The best that can be said of them is that if our civilization lasts long enough, they may some day be systematized. That possibility is decimated, however, by our forty-nine different jurisdictions, all working to maintain the prestige of their own views. I am a believer in miracles, and am quite sure that only a miracle could accomplish it. Anyway, in discussing the application of the Rules to fact-finding boards, we are discussing the application of the Rules as they are, not as they might be; and right now they are a sprawling protoplasm which exhibits life but only rudimentary form. When we speak of imposing these rules of evidence upon fact-finding boards we do not speak of imposing a logical, perfected system, but of imposing a heterogeneous collection whose parts could probably not be learned; if learned, would probably not be completely understood; and at any rate could but seldom be properly applied."

He paused to drain his glass, shake the ice back and forth in it, and to survey the soldierly array of drinks on the table. They seemed to give him courage, his face crinkled with the good feeling of an agreeable thought, he picked up a full glass and began his pacing more slowly.

"The judges of the United States are selected," he continued, "from among the members of the bar and usually from among those of its members of outstanding ability and learning. Such men have long experience with the Rules; they know their value to the defendant, and their handicap to the plaintiff. They understand the great purpose of the Rules, if the Rules have any great purpose. They know when the Rules are wisely used and when they are abused. The rules have by long usage become a part of their lives, and yet, when they mount the bench, they make mistake after mistake in applying them, and are reversed time after time because of them. Now fact-finding boards are composed of educated men, frequently lawyers; but few of them indeed will know the Rules as do their regular judges. Hence, to force the boards to apply the Rules would inevitably lead to more frequent mistake, numberless reversals and hopeless confusion.

"The lawyers who most savagely defend the imposition of Rules are often completely inconsistent. They abolished the teaching of law by rule and text and substantiated the teaching by case. Yet they demand that the boards shall memorize and impose a mass of rules whose meaning can be properly understood only in connection with the decisions which established them and which they could in consequence but feebly understand.

"However, if you were to argue for a day on your side of this question, you would doubtless change many of my ideas without altering my general opinion. On the other hand, if I were to argue for a week on my side of the question, I would doubtless produce no change in you whatever. Consequently, to avoid the difficulties inherent in inflexible pride of opinion, and to obviate the bickering which arises from bigoted argument, let us deduce the elements of a perfect judicial system and see whether an ideal system needs the Rules of Evidence. If the ideal judicial body does not need the Rules, and if our board even roughly approximates an ideal system, I will conclude that they should not be applied; and you will doubtless remain of your own opinion.

"You must pardon my slighting reference to the mental flexibility of a legal classicist, but I have observed that the classicists have an undue awe, like the collectors of decrepit antiques, for the wormy things of the past. Like superstitious savages they knock their brows thrice upon the ground before the Rules, not because they are good or because they understand them, but because they are old; and not because they add substance to ethereal justice, but because they have the fixity of the latest imitation of eternity—print.

True Function of the Rules

"I conceive that the true function of the Rules of Evidence is not by imposition to hamper a court in action but by the study of the decisions whence they were derived to instruct the doctors of the law in logic. The need of any court at the moment of decision is not Rules but logic. Taken individually, the decisions that founded the greater Rules are excellent studies in logic, and can scarcely be excelled as a means of inducing logical thought processes. This is their true function. We do not need an inflexible Code of Hammurabi to be applied blindly by parrot judges, but judges with learned minds trained in logic who can by taking thought, reach correct conclusions. Our perfect system will consequently have judges who are learned and who are skilled in logic."

At this point the Professor, whose glass was subconsciously annoying him by interfering with his gestures, absentmindedly put it down, then continued:

"The philosophical mind sees mice, men, and jurors, not as individuals possessed of minds, morals and noses but as types. He sees mice not as Mickey Mouse, but as the intellectual concept—mice. He sees a man sitting in a judicial position, not as a man, but as a judge, a part of judicial sovereignty, having the power and obligation to decide certain questions. He has his counterpart

in any system where any man with similar power decides similar things. Any judicial tribunal must have judges and any tribunal which operates with authority of law to decide questions of fact is judicial.

"The simplest system is the Oriental in which a man sitting as a judge decides as he thinks right —spot judgment with no formality—as in Ethiopia where the judges go about the streets hearing causes wherever litigants may find them. The most complicated is the common law jury trial, where all the cumbersome and expensive process of grand jury, state's attorney, indictment, process, and pleading must be had before an accused can even be brought before his judges. Our own tribunals are generally speaking, of three kinds: Judges acting alone, juries acting with the assistance of judges, and fact-finding boards or administrative tribunals. Obviously juries and judges are fact-finding boards in a broad sense, but in a more proper and restricted sense a fact-finding board is a judicial body of limited jurisdiction, subordinate to and not a part of the regular judicial system.

"I remember a story in which one of two surviving occupants of a desert island is hanged by the other for murder, the act being defended, whether rightly or not, as a legitimate act of residual sovereignty. That man must have exercised all the functions that any judicial body, be it judge, jury, or fact-finding board can exercise. There must have been an arrest, a finding of fact, an application of law and an execution. The various judicial systems of the world do no more; they perform functions alike in compelling the attendance of the accused, receiving evidence, finding the facts, applying the law and compelling the judgment to be executed. They differ only in the means of performing these functions.

"If the man with power to decide is called a juror, a referee called a judge prevents him from hearing some of the evidence, but if he is called a juge d'instruction, he gets it all. The fighting is about whether a judge decides better from emasculated evidence or from all the evidence. To me the question is a grave one, but to you who are a part of an existing legal system, whose very air is filled for the greater part of the day with judges and jurors, it is doubtless impossible to see the system as anything but a Divine dispensation granted to this race alone; doubtless impossible for you to see that it is just another judicial system, performing the same functions as the other judicial systems, and possessed of similar component parts.

"Acknowledging the potentiality of the jury trial as the most magnificent of legal systems, I am compelled to say that its method of selecting a judicial body can hardly be worse. Of the populace most are average, many are ignorant, and some criminal but not yet caught. Our juries are a cross-section of the populace with this exception, that many of the more intelligent people have means which they use to avoid serving. I could enlarge on the imperfections of the jury system endlessly, but will sum it all up in these words: Jurors are selected at random and not for their knowledge; they sit in judgment only temporarily and have no time to acquaint themselves with their duties; and they are not fitted by experience or training to do a good job of judging. I believe that of the miscarriages of justice which are perpetrated by juries, most arise from the jury's strangeness and not because it is composed of people who are unconscionable or without civic virtue.

"Before carrying your condemnation of the jury system too far, remember on the other hand that the jury is the last remaining vestige of popular sovereignty; all other popular sovereignty except the town meeting in New England hamlets has been superseded by representative government or administrative bureaus. Consequently, even though the jury is not theoretically ideal as a judicial body, we must retain it. Furthermore, in the jury system, and I am not now speaking of the Rules of Evidence, there is a praiseworthy division of labor. Efficiency is served according to Adam Smith, whenever a system can be divided into component parts each of which is operated by a specialist. At a jury trial a filtering device called a judge removes the silt from the waters of truth, the jury drinks in the filtered evidence, finds the facts, and the judge applies the law. In theory only. In fact, the judge tells the jury what law should be applied to certain findings of fact and the jury both finds the facts and applies the law. That is an imperfection. Furthermore, the only member of the tribunal present because of his learning, the only one known to be competent to judge is deprived of a voice in the actual decision. That is another imperfection, but despite these and other imperfections the system still has potentialities of development unsurpassed. But the development must be advance and not recession, not the type illustrated by the bill now in Congress to restrict further the influence of the judge in Federal court practice. That bill shows that today as in Milton's age, is 'the brood of Folly without father bred.'

"The Rules of Evidence were evolved for the jury system and for the type of judging body which the jury system provides. The Rules of Evidence are based upon the assumption that the jury will be inexpert, unfamiliar with its duties and incapable of separating the pertinent from the pernicious. The main function of judge and Rules is to make up for the imperfections of the jury; to exclude the chaff before jury is allowed to see the wheat.

"No such imperfections exist in the usual fact-finding board. A fact-finding board is a jury, but it is a permanent jury having time to acquire experience, knowledge and familiarity with its duties. Its members are selected for their knowledge of the particular subject on which the board is to operate or because of some special qualifications for the work. They are usually educated, if not learned men; their experience in the world is usually large and their knowledge of men and things is proportionate. Their character as individuals is no better than the character of individuals on a petit jury, but their character as a group is often higher than the group character of a petit jury. A well chosen fact-finding board should be an ideal judicial body. In short, they have the qualifications which the average jury lacks, and the reasons to impose the Rules upon them, which exist for imposing the Rules upon a jury do but seldom exist, and such a body would not need the protection and would be hampered by the complication of the Rules. When I think of applying the Rules

of Evidence to the operations of such a fact-finding board, I get that dark-brown taste."

Here he snatched up his glass, thoroughly washed the dark-brown taste away and continued:

"Being a schoolman, I shall begin my discussion of lawyers by stating the schoolman's point of view, that lawyers are a group of beings who are doubtless part of the race but who probably got a late start in evolving from the ape. I shall also parrot the allegations that the things mainly wrong with the legal systems of the world are the lawyers who are devisers of destructive difficulties, generators of groundless objections, conceivers of confusion and the very fathers of lies, and that if the lawyers had been excluded from the practice of law, honest men would have pleaded their cases honestly and justice would have been more nearly served. By doing so I will be applauded by the newer professions. But after I have received their accolade, I shall deny them and state that such allegations are slanders most vile. Not only are the lawyers better than they are accused of being in particular practice, but they are the makers of civilization. The law is not judge-made; it is lawyer-made.

"I am a student of history, as an avocation, and I have read of the rise and of the fall of nations, of the increase and the waning of civilization in ancient times and in modern. I have read of civilizations that rose high and remained long without scientists or oboe players, but of none that ever rose without lawyers or ever lasted without soldiers. The lawyer is responsible for the existence of such civil order as permits settlement of controversies by means other than weapons.

History inform us that there have been men who were masters in many lines: Bacon was lawyer, philosopher; da Vinci was engineer and painter; and Aristotle was all things to all men. But although the age of wonders is still with us, the age of superintellects has passed. It is all one man can do to make himself expert in part of a single field, to say nothing of mastering many. The banker is content to have knowledge of banking, and to hope that his knowledge is not all wrong; the doctor writes his prescriptions with his fingers crossed and hopes some one will discover a specific; and the business man is content with knowledge of his small field of merchandising. They have no time to learn the law, hope never to need knowledge of legal practice, and make no outcry against lawyers when they need one. To expect a banker to present his own case in court is as absurd as to expect a stenographer to catch her own fish for her dinner, or if she eats oysters, to do her own tonging. From the point of division of labor, consequently, it is highly desirable that skilled lawyers shall plead the cases of their clients. problems of the clients, so that just laws may be made. Wise laws can be made only if some men, not themselves beset, make an intimate, intelligent study of the problems that beset society. Such men are lawyers, regardless of the title they bear.

Even more important is it that these skilled lawyers shall have intimate acquaintance with the and no more important service is rendered to humanity than the making of the codes that establish civil order. To preserve and foster it is the function and high calling of those who serve the law."

He paused to drown the dryness of his throat, and I opened my mouth to object but, seeing me, he gulped hastily, strangled a bit, but before I could utter a word, said:

"Your objection that it is not the lawyers who have made the law, but the courts, is not truly false, but is falsely true. Did you ever attend a trial? The judge sits behind his bench; he appears to listen to the mass of evidence presented. An objection is raised; he seems to recall himself from far and fairer fields, while the lawyers argue the point; he rules, seemingly adopting the more weighty reasons. Who made the law of that point? The court? No, a million decisions say no! The court did not raise the point nor present the reasons. They were all presented by the lawyers. The court did not make the law, the court did but select the law which fitted the case. The knowledge might have been in the mind of the court (we have no means of proving otherwise), but that it was in the minds of lawyers is certain because they raised the point and presented the reasons. The court no more made the law than the referee in a football game makes the touchdown. He rules that the crossing of the goal line under certain circumstances constitutes a touchdown, but it is the winning team, the advocate for dear old alma mater, which did the act which constitutes the rules of the case. But after all, who are the courts but lawyers with civil power?

Learned Lawyers as Essential as Unprejudiced Judges

"I say, therefore, that in any perfect judicial system it is as essential that there shall be learned lawyers as that there shall be unprejudiced and learned judges. Let the lawyers know their stuff and you have a far better safeguard than any Rules of Evidence."

The Professor ceased his circumpacing of the room before the sideboard, placed the second empty glass beside the other, gazed at the array studiously. Then drawing his breath audibly he picked up another, bent his other hand behind his back and resumed his walk.

"Your interruptions," he said, although I had not interrupted, "derail my train of thought. However, I shall try to answer your objections. You think that the Rules protect the litigants against a possibility of error, that there is a difference between conducting a trial under the common law rules, and conducting it under no rules at all, and that since no other Rules of Evidece exist, the Rules must be applied or justice will fail. Now I want to admit that where a man is on trial for his life or his liberty, where he is charged with a crime, he must be given every protection, even to the extreme privilege of not incriminating himself. The world has no means equal to the jury trial and the Rules of Evidence for accomplishing this desirable end. But the jury in such a trial is inexpert, and the Rules are applied at least as much to prevent them from committing inexpert error as for any direct benefit to the party before the court. Omit the criminal aspect, use an expert jury, and

the party seems not to need such extreme protection. Certainly the rules, in criminal cases or not, do not protect the litigants against error. Observe the number of retrials, rehearings, reconsiderations and reversals that are for the violation of some sacrosanct rule. The rules themselves, far from preventing error, are a source of it. It has reached the point in trials that a party not only has his lawyer, but the lawyer has an assistant who is expert in the Rules of Evidence, and who prompts him to make this, that, or the other objection at every statement of the witnesses and every comment of other counsel and to take an exception to every ruling by the judge. It is a battle of cheap memory; the person who has the longest memory thinks of the most objections, gets the most rehearings or retrials, and if he does not win the case at least prolongs the proceedings until the victory of his opponent is barren.

Effect of Rules in Preventing Error Exaggerated

"The effect of the Rules in preventing the possibility of error has been magnified by the lens of exaggeration, which is distorted by the astigmatism of bad analysis. Consider the sources of error and think of the best remedy: There are three possibilities of error in any judicial tribunal; incomplete evidence, mistake of fact by the judging body, and error in law. Rules of Evidence apply only to the second of this triumvirate and are only a partial aid there: They are consequently, far less than 33% efficient and that is not enough.

"However, you disagree with my statement about the effect on the second source of error, so to appease you I concede that the Rules reduce the numbers of errors arising from the second cause. Opposed to that, however is the undoubted fact that the Rules hamstring the course of logic by cutting the sinews of truth, prevent the consideration of pertinent facts for synthetic reasons, and have no effect whatever on the presentation of complete facts to the tribunal, or on application of the law to such facts as are found. I conclude consequently, that they are not such a safeguard against error as warrants their imposition upon the minds of any trained fact-finding board."

He squinted down into his glass, as though to measure his speech by the length of his drink, and continued:

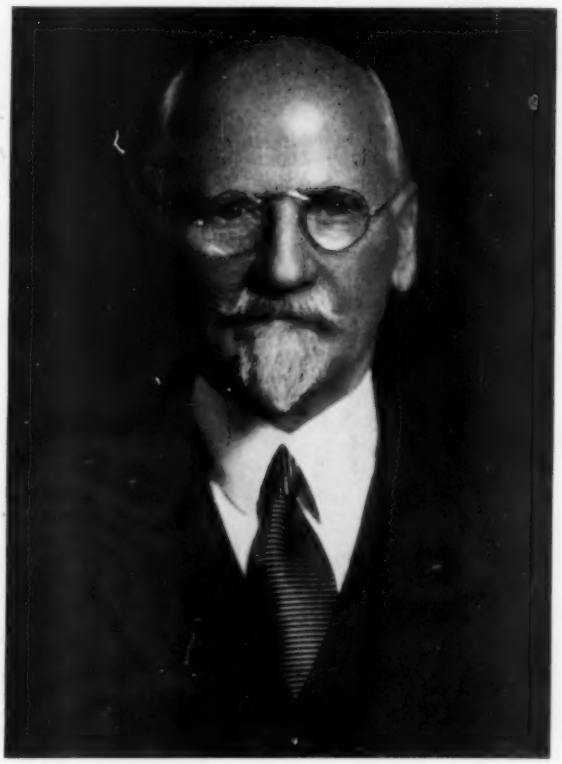
"Your objection is only seemingly reasonable; the refutation seems to be in this fact, that the ultimate protection against error in any judicial system comes not from hampering the first fact-finding agency with an enormous set of Rules, but by granting the litigants the right of appeal. The first tribunal should have the freest and the most absolute power, consistent with Constitutional guarantees, to determine the truth. If the peculiar conditions confronting a particular fact-finding board require that certain limitations be placed upon its powers or upon its procedure, the court of appeal can establish those rules, but to establish a few particular rules for particular cases is the opposite of inflicting the whole mass upon a tribunal ab initio. If you say that the board might commit undiscovered error, I reply that no litigant whose case is handled by a trained lawyer need fear that contingency nearly as much as he needs fear the complications of the Rules. Consequently, if your last argument is that the Rules must be imposed upon fact-finding boards in order to protect the litigant against the possibility of error, you stand defeated because it neither prevents the possibility of error nor is the cornerstone of protection. The pillars of protection are these: to be represented before the tribunal by a legal expert, and to have the right of appeal to intelligent judges learned in all the rules of law and of logic."

With the demeanor of an ancient knight who had, with complete breaking of girths and shattering of armor, overthrown his enemy, the Professor punched the air with his glass as a knight with his lance and positively charged about the room.

"Listen," he said, "The requirements of an ideal fact-finding board are these: that it shall have competent judges; that it shall have power limited only by morality and public policy to discover the truth in any cause rightly before it; that it shall guarantee the usual Constitutional rights; that it shall be served by a body of competent lawyers; and that its decisions must be reviewable by the regular courts.

"Such a board, protected by such a system, has no need of any Rules of Evidence except those which may from time to time be established for its particular use by its own court of appeal."

Whereupon he downed his drink, gazed with surprise and indignation at the glasses yet untouched, seized his hat and my coat, and dashed from the house.



THOMAS E. ROBERTSON
Chairman, Section of Patent, Trade-Mark and Copyright Law

DELEGATES FROM THE AMERICAN BAR ASSOCIATION TO CONGRESS IN BUDAPEST

From left to right: Curtis C. Shears, of New York City; Pendleton Beckley, of Paris, France; Charles Ruzicka, of Baltimore, Maryland; and Alfred K. Nippert, of Cincinnati, Ohio. This picture shows the four delegates from the Association to the "Union Internationale des Avocats," in the Hall of the Curie Royale, Supreme Court of Hungary. The Congress was held September 8-11, 1938.

JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES

Importance of Formulation of Definite Policy in Near Future as to Extent to Which Judicial Review of Administrative Findings and Orders Should Go—Chaotic Condition of Law as to Review of Fact-finding Agencies Can Be Resolved by Reshaping the Statutory Right of Appeal to Fit Four Kinds of Cases—Five Types of Judicial Review of Administrative Determinations Discussed in Detail—Part of Past Difficulty Due to Hope of Building Procrustean Bed of Proper Length for Every Case—Some Specific Suggestions Submitted

By Albert Smith Faught
of the Philadelphia Bar

At the Cleveland meeting of the American Bar Association held in July, 1938, certain problems of administrative law were faced and the results of an exhaustive factual study were presented. At this point an adjournment occurred after the Association had adopted a recommendation that one of the future objectives would be "the formulation of a definite policy as to the extent to which judicial review of administrative determinations should go with respect to questions of fact in order best to promote the administration of justice."[1]

The purpose of the present article is to help in speeding the work of the organized bar in attaining the foregoing objective as to the formulation of policies in the domain of administrative law. In the opinion of the present writer the chaotic condition of existing law is due to failure to recognize that there are half a dozen types of administrative determinations each of which may involve a different formula in balancing the needs for justice, judicially determined, against the necessities for efficiency in the administrative departments of the state and federal governments.[2]

The subject will be here approached at the point at which it was left at the recent meeting of the American Bar Association. For the benefit of those who did not attend that meeting a few brief excerpts will first be given from the more significant addresses and reports which define the problem. This will be followed by an analysis of certain decisions of the United States Supreme Court which indicate the constitutional limitations which must be kept in mind in the formulation of legislative proposals.

Finally an effort will be made to reduce to half a dozen distinctive types of legislative determinations the mass of situations found upon the statute book today. A definite policy will be suggested as to each type.

I
STATEMENTS DEFINING THE PROBLEM

At the Cleveland meeting of the American Bar Association Albert E. Stephan, Esq., read a paper, which received the Association's Prize Essay Award for 1938, entitled: "The Extent to Which Fact-Finding Boards Should be Bound by Rules of Evidence."[3] Mr. Stephan, after careful study, lays down two rules for testing the sufficiency and fairness of the powers and practice of a fact-finding board:

"What, then, should be the test? It is submitted that it should be:

"First, a fair hearing in all cases, civil or quasi-criminal, preserving fundamental rights of sworn testimony, confrontation, cross-examination, and rebuttal, requirements that all evidence be of record, and that there be seasonable objection to adverse rulings. Each of these principles facilitates functioning of the fact-finding board as a 'prompt, continuous, expert and inexpensive method' and accords with 'the rudiments of fair play.'

"Second, admission of all relevant evidence, if

"(a) In the board's judgment, having regard to the necessity, availability, and reasonableness, as shown by such elements as trustworthiness, economy, promptness, and convenience, it is the best obtainable evidence of the fact;

"(b) It is offered in public hearing so that the proffering witness and evidence are subject to cross-examination and rebuttal testimony;

"(c) Jurisdiction is vested in the board to determine what, if any, weight to accord particular evidence in the light of all the surrounding circumstances;

"(d) The board is required to make a report in writing, clearly stating its findings of fact and conclusions of law as an antecedent to any valid order, and

"(e) Judicial review of findings of fact is limited by certiorari or otherwise to a consideration of the fair and reasonable observance of these principles."

A second significant contribution was made by the Section of Judicial Administration which submitted to the Association an elaborate report of 180 pages which included detailed factual statements of the existing methods in each of the states whereby judicial review may be made of administrative action in six selected subjects or fields of law.[4]

The recommendations of the Section, duly approved by the American Bar Association, read:

1. Separate pamphlet containing Reports of the Section on Judicial Administration, presented at the 61st Annual Meeting of the American Bar Association, page 117.

2. As this article is being written the Constitutional Convention of New York is wrestling with the question of the judicial review of findings of fact of administrative agencies. The newspapers give no hint that the debaters recognize the plural nature of the problem, and the possibility of solving it by splitting it into parts, permitting complete review for certain types of determinations, and denying such reconsideration of the facts in other classes of findings and orders.

3. Vol. 24 Am. Bar Ass'n. Journal 631, August, 1938.

4. Public Utilities including Railroads, Securities (Blue Sky laws), Workmen's Compensation, Unemployment Compensation, Insurance and Income Taxes. For a copy of this Report apply to the American Bar Ass'n., 1140 North Dearborn St., Chicago, Illinois.

"We recommend that this committee be continued, and we suggest as the program for the coming year a continuance of the investigation with the following objectives:

"A. The ascertainment of the facts with regard to existing methods of judicial review in the federal field, along the lines of the study which we have made this year in the states. This investigation should be so carried out as to avoid conflict with, or duplication of, the work of the association's special committee on administrative law.

"B. The formulation and recommendation of a definite policy as to the extent to which judicial review of administrative determinations should go with respect to questions of fact, in order best to promote the administration of justice. This policy will not necessarily be uniform for all types of administrative activity, or as between the states and the federal government.

"C. A consideration of the most desirable place of judicial review in the states: whether in a regular court of appellate jurisdiction or of last resort; and if in a nisi prius court, whether it is best to concentrate the review in the courts of a single county or to scatter it throughout the state; or whether the creation of a new court of exclusive, state-wide jurisdiction in matters of administrative appeal would be desirable.

"D. A consideration of the extent to which the standing of the administrative determination, when it reaches the courts for review, should be affected by (a) the admission and consideration of evidence by all the administrative tribunal, which would not be deemed competent in a court of law or equity, and (b) the couching of the administrative determination in mere statements of ultimate conclusion without detailed and specific findings of the facts on which the conclusion rests."

The Association's Special Committee on Administrative Law presented in the Advance Program of the 61st Meeting a carefully reasoned discussion of some of the underlying principles which should govern further advances in this field.[5]

We quote at page 145:

"What the profession must insist upon is such an adjustment of administrative jurisdiction and practices and determinations to the general law, and of the doctrines of the general law to the exigencies of effective administration, as will preserve the guaranteed rights of individuals and yet permit of effective securing of public and social interests."

"The more complex a society, the more and more numerous and complex the relations and groups and associations of which it is made up, the more complicated becomes the task of adjusting their conflicting and overlapping interests and clashing activities. Hence the more need of a system of balance as contrasted with offhand adjustments for the time being which usually take the form of giving in to the more insistent and unreasonable. The increased tasks of the central government and new demands upon federal administration involved in the shifting from agriculture to industry, from country to city, and from economic local self-sufficiency to economic unification and business transcending geographical lines, give rise to more rather than less need to checks upon the central authority to safeguard local needs in so vast a domain as the United States in which changes have come and are going on at such varying rates. In the American polity administration is under and a part of the legal order and so under the body of authoritative precepts and standards governing all human action."

The distinguished Committee, of which Dean Roscoe Pound was Chairman, added at page 162:

"Many of the objections to judicial review of administrative action grow out of the manner in which such review has to be obtained. The procedure takes many forms, having grown up haphazard by statutory additions to and judicial development of certain common law and equitable remedies."

The Association was also reminded of the thoughtful statement made a year before by the President of the American Bar Association, Dr. Arthur T. Vanderbilt, who in discussing the fact-finding powers of an administrative official, said:[6]

"I am concerned because he tries issues of far-reaching importance, many of which are of more moment than those tried by our ordinary judges in our traditional courts. I am concerned because I cannot obtain the same review of the decisions as I can from that of a trained equity or admiralty judge. I cannot see why the finding of fact of a trained equity or admiralty judge should be subject to complete review, as the experience of centuries has shown is essential and indispensable, while the findings of fact of the commissioner, who is often without legal training, in cases far more complicated than ordinary equity or admiralty suits, is subject to a far less rigid review."

The brief statements above quoted may suffice to invite the attention of the organized bar of this country to the importance of formulating in the near future definite policies as to the degree to which judicial review should be made of the findings and orders of administrative boards and officials.

The task is to resolve the problem into logical parts and then to see the extent to which judicial review is feasible and advisable as to each major type of administrative determination having in mind the possibility of remedial action by act of Congress, by statute or by rule of court.

Before embarking on this quest we desire to sharpen the focus by calling attention to the opinion of the Supreme Court, delivered by Chief Justice Hughes, and the concurring opinion filed by Mr. Justice Brandeis, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 80 L. Ed. 1033. The Chief Justice said (at page 51, 1041):

"The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional

5. The report begins at page 134 and incorporates at page 165 the text of a proposed Act of Congress "To Provide for the More Expeditions Settlement of Disputes with the United States and for other Purposes."

6. Quoted in the Report of the Committee on Administrative Law at page 141.

rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded."

Associate Justice Brandeis added (page 73, 1052):

"Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed."

Justice Brandeis carefully reviews many of the cases dealing with the due process clause. He calls attention to the distinction between the right of liberty, where due process involves court review of the facts by writ of habeas corpus, and other constitutional rights, where due process does not necessarily or invariably require a judicial review of the facts. Justice Brandeis closes by describing the vast amount of time, expense and legal and judicial work involved in the larger rate cases. His conclusion reads (page 92, 1062):

"In deciding whether the Constitution prevents Congress from giving finality to findings as to value or income where confiscation is alleged, the Court must consider the effect of our decisions not only upon the function of rate regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed?" . . . "Congress concluded that a wealthy and litigious utility might practically nullify rate regulation if the correctness of findings by the regulating body of the facts as to value and income were made subject to judicial review. For that conclusion experience affords ample basis. I cannot believe that the Constitution, which confers upon Congress the power of rate-regulation, denies to it power to adopt measures indispensable to its effective exercise."

II

REVIEW OF ADMINISTRATIVE ACTION UPON ASSERTION OF CONFISCATION

The dark picture painted by Justice Brandeis as to the vastness of the judicial, legal, clerical and other work involved in any important rate case may be traced in part to two factors: First the principle that the fixing of rates is a legislative act, and the public utility commission undertaking rate regulation is an agency of the legislature, and is itself to be deemed a legislative body.[7]

The second factor is an acceptance of the principle that where the utility concerned has large investments at stake any rate which does not yield a fair return may be confiscatory.[8] Accordingly in practice a rate case may have two stages completely independent of each other, and the protesting utility may be given, on constitutional grounds not merely one day in court, but the privilege of opposing a threatened rate by two distinct series of legal proceedings. It may participate actively in the proceedings which lead to the legislative act of establishing a rate, and it may then, de novo, bring a bill in equity to prevent the enforcement of such rate as violating its constitutional rights and constituting a confiscation of its property.[9]

The Ben Avon case, reported as the *Ohio Valley Water Co. v. Ben Avon Boro.* 253 U. S. 287, 64 L. Ed. 908[10] is in the opinion of the present writer still an authoritative leading case on the subject of the necessity for redetermination by a court of findings of fact made by an administrative agency which partakes of a legislative character in establishing rates or fixing prices. Whether the agency is a utility commission or an individual officer, such as the Secretary of Agriculture in the St. Joseph case, the necessity of permitting the court to study the evidence in the record and come to its own conclusions as to findings of fact as well as of law seems to be a firmly entrenched principle of constitutional law. Only by a recognition of this principle may the assertion or confiscation be faced and answered.

Attention is invited at this point to the recent case of *New York ex rel Consolidated Water Co. v. Maltbie,* 58 Supreme Court 506, 82 L. Ed. 489 (Advance Reports) in which the proceeding for review by certiorari under the New York practice was apparently deemed adequate in meeting the constitutional requirements as to judicial review in rate cases. In a Per Curiam opinion it was said:

"Appellant contends that it is entitled to the exercise of the independent judgment of a court as to the law and the facts with respect to the issue of confiscation and that such a review has not been accorded because of the limitations imposed by the state practice in certiorari proceedings. 275 N. Y. at p. 370, 9 N. E. (2d) 961. Appellant has no standing to raise this question as appellant itself sought review by certiorari and has not invoked the plenary jurisdiction of a court of equity and it does not appear that this remedy is not available under the state law. Pennsylvania Gas Co. v. Public Serv. Commission, 211 App. Div. 253, 256, 207 N. Y. S. 599; New Rochelle Water Co. v. Maltbie, 248 App. Div. 66, 70, 289 N. Y. S. 388."

The Supreme Court distinctly recognized the availability of proceeding in equity.

If the statutory review of the administrative agency establishing rates had permitted the court to examine the record and make its own findings of fact there would have been no constitutional right, on the claim

7. In Ohio Valley Water Co. v. Ben Avon Boro., 253 U. S. 287, 64 L. Ed. 908, Mr. Justice McReynolds said: "The order here involved prescribed a complete schedule of maximum future rates, and was legislative in character."

8. Chief Justice Hughes said in the St. Joseph case at page 49 (1040) "Here, a large capital investment is involved and the main issue is as to the alleged confiscation of that investment."

9. Illustration appears in opinion of Justice Brandeis at page 90 (1061): "New York telephone rates. In the winter of 1919 the Company increased its rates. Protests followed; and on October 18, 1920, hearings thereon began before the Public Service Commission. On March 3, 1922, a temporary order slightly reducing certain rates issued. Enforcement was enjoined by the federal court on a bill which charged that the rates prescribed were confiscatory. Since that time, the rates prescribed, and to be prescribed, have been continuously under investigation and litigation."

10. Reversing the Supreme Court of Penna. 260 Pa. 289, which had reversed the Superior Court, 68 Pa. Super. Ct. 571. The opinion of the Superior Court was rendered by Judge Kephart, the present Chief Justice of Pennsylvania.

of confiscation, to resort de novo to a court of equity, for the remedy at law, in the rate establishing proceeding, would then be adequate.

Accordingly it is now suggested that the following principle should be incorporated in any program for the handling of judicial review of administrative determinations:

FIRST. To the extent that a claim of confiscation necessitates a judicial redetermination of the facts, as in rate cases and the action of legislative agencies fixing rates and price limits, such redetermination should be made by the court in reviewing directly the proceedings in which rates or price limits are established. This would meet constitutional claims and would render unnecessary the separate proceeding de novo in equity which is now frequently permitted in rate cases. The two distinct opportunities for adducing testimony now allowed in such cases, once before the utility commission and then in a court of equity, would be reduced to one, namely proceedings involving a hearing conducted by the administrative agency and the court review of such proceedings:

The authoritative basis for the foregoing suggested rule is found in the opinion of the Supreme Court, stated by Chief Justice Hughes, in *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, at page 46 (page 46, 610):

"Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with the law, from making its own examination and determination of facts wherever that is deemed to be necessary to enforce a constitutional right properly asserted."

Let us turn now to the problem of judicial review of administrative bodies in which the claim of constitutional right by reason of confiscation is not asserted.

III

REVIEW OF ADMINISTRATIVE ACTION NOT INVOLVING CONFISCATION

A leading case in which the question of confiscation is, as a practical matter, absent is *Tagg Brothers v. United States*, 280 U. S. 420, 74 L. Ed. 524, in which the Packers & Stockyards Act of August 15, 1921, 42 Stat. at L. 159, U. S. Code title 7, sec. 201, was upheld as conferring power upon the Secretary of Agriculture to issue orders prescribing rates to be charged by persons engaged in buying and selling in interstate commerce on a commission basis. In this case dual proceedings were taken as in other rate cases, one, before an examiner and the Secretary of Agriculture in which rates were promulgated, and, second, in equity in a federal district court to test the constitutional validity of the rates thus established.

The Supreme Court of the United States, in an opinion by Mr. Justice Brandeis, after citing many cases, said at page 442 (page 535):

"We find the evidence before the Secretary ample support for the findings and the conclusion reached by him. It may be that some of the evidence was irrelevant of or little weight, and that some of the reasoning was not persuasive. But mere admission by an administrative tribunal of matters which, under the rules of evidence applicable to judicial proceedings, would be deemed incompetent, or mere error in reasoning upon evidence adduced, does not invalidate an order made by it. It has been settled in cases arising under the Interstate Commerce Act that if an order rests upon an erroneous rule of law, or is based upon a finding made without evidence, or upon evidence which clearly does not support it, the order must be set aside. These rules are applicable also to suits arising under the Packers and Stockyards Act. But the order here assailed is not subject to any of these infirmities."

and, on the next page:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now. On all other issues his findings must be accepted by the court as conclusive, if the evidence before him was legally sufficient to sustain them and there was no irregularity in the proceeding. To allow his findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal as the rate-making body. Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. Compare Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 550, 56 L. ed. 308, 312, 32 Sup. Ct. Rep. 108. A rate order is not res judicata. Every rate order made may be superseded by another."

In the case of Crowell v. Benson, already cited, it was stated (page 78 of 285 U. S.) (76 L. Ed. 628):

"Resort to administrative remedies may be made a condition precedent to a judicial hearing. Northern P. R. Co. v. Solum, 247 U. S. 477, 483, 484, 62 L. ed. 1221, 1226, 38 S. Ct. 550; First Nat. Bank v. Weld County, 264 U. S. 450, 454, 455, 68 L. ed. 784, 787, 788, 44 S. Ct. 385; United States Nav. Co. v. Cunard S. S. Co., 284 U. S. 474, ante, 408, 52 S. Ct. 247. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution. First Nat. Bank v. Weld County, 264 U. S. 450, 68 L. ed. 784, 44 S. Ct. 384."

Mr. Justice Brandeis in the St. Joseph case added (page 84, 1058):

"But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command."

Finally, Mr. Justice Sunderland in *U. S. Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, 76 L. Ed. 408, said at page 482 (413):

"But the distinction between that case and one where preliminary resort to the commission is necessary was definitely stated. Such resort, it was said, must be had where a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, and also where it is necessary, in the construction of a tariff, to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction. In all such cases the uniformity which it is the purpose of the Commerce

Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts." . . .

"So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the commission, Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553 27 S. Ct. 350, 9 Ann. Cas. 1075, where the question was as to the reasonableness of the carrier's practice in distributing cars, Midland Valley R. Co. v. Barkley, 276 U. S. 482, 72 L. ed. 664, 48 S. Ct. 342, where the reasonableness of a particular practice of routing was involved, Northern P. R. Co. v. Solum, 247 U. S. 477, 483, 62 L. ed. 1221, 1226, 38 S. Ct. 550, where the continuance of service on an industrial track was assailed as unduly discriminatory, Western & A. R. Co. v. Georgia Pub. Serv. Commission, 267 U. S. 493, 497, 69 L ed. 756, 45 S. Ct. 409, and where an action was brought under § 7 of the Anti-trust Act, based upon an alleged conspiracy among carriers to fix rates, Keogh v. Chicago & N. W. R. Co., 260 U. S. 156, 67 L. ed. 183, 43 S. Ct. 47."

It does not seem necessary to recapitulate the familiar rules of law voiced in the foregoing opinions. The function of an administrative pre-determination of complicated facts is clearly stated. The duty of the court to grant full relief for errors of law committed by an administrative body is understood. But the restriction of the powers of the court in reviewing the facts to the record brought before it for review is well defined. A finding of fact, in this broad class of cases, is usually deemed binding upon the court, as in case of certiorari, if there is evidence in the record adequate to sustain such finding. The relaxation of the rules of evidence in proceedings before administrative agencies is covered by Mr. Stephan, whose prize essay was referred to at the beginning of the present paper.

The following specific suggestions are now submitted (continuing the series of numbered paragraphs):

SECOND. A pre-determination of the facts by an administrative agency is a matter of convenience in certain classes of cases, such as (a) those normally involving inquiries into intricate situations; (b) those mony; and (c) those normally involving expert testimony. In such and kindred classes of cases it may be stated as a matter of policy that the administration of justice may be furthered by requiring a pre-determinanormally necessitating the taking of voluminous testition of the facts by a statutory administrative board or agency.[11]

THIRD. The rules as to the admissibility of evidence may, as a matter of policy, be relaxed in proceedings before administrative agencies. This relaxation may follow two lines. First, by putting into effect rules of convenience in the presentation of evidence, such as embodied in the draft prepared by the Commissioners on Uniform Statutes entitled "Uniform Composite Reports as Evidence Act" (1937 Pocket Sup. vol. 1, Sales, page 4, of Uniform Laws Annotated).[12] A second way in which the rules as to evidence may be simplified or relaxed is to permit in evidence any testimony which under a "rule of reason"[13] tends to support (or negative) the facts in issue.

FOURTH. There should, however, in proceedings before administrative agencies be no marked departure from the time honored rules of fair play. An agency should have its doors open to either party to a controversy. It should give reasonable opportunity for cross examination. Where the agency makes its own investigation of the facts, a memorandum as to such investigation must be included in the record, and an opportunity must be given to cross examine those making the investigation. Reasonable notice of the issues should be given, substantially in accordance with the new Federal rules governing pre-trial hearings, where formal pleadings have been eliminated.

FIFTH. To speed the final determination of controversies, the admission of incompetent evidence on the part of the administrative agency should be deemed harmless error where there is other competent evidence to support the findings. For the same objective, an early completion of the proceedings, the administrative agency should, as a matter of policy, be encouraged to place in the record proffered testimony the competency of which may be doubtful, so that the court, in making a review may have the benefit of such evidence if it should turn out to be admissible, and not be forced to return the proceeding for a further hearing.

It should be observed that the subject of evidence is in a large measure procedural, and accordingly, a court having rule making power may formulate rules for the guidance of administrative agencies as to the preparation of the record and the taking of testimony.

IV

JUDICIAL REVIEW OF ZONING CASES

Zoning cases may come before the court in various ways. The case of *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, was in equity for an injunction against the whole zoning ordinance. *Gorieb v. Fox*, 274 U. S. 603, 71 L. Ed. 1228, was mandamus for the granting of a permit. But the customary mode of review is by direct appeal to the court from the action of the board of zoning appeals in regard to a petition before it, or as to its action in reviewing the act of a building inspector in granting or withholding a permit. For practical purposes the zoning board of appeals, despite its title, is an administrative agency of first instance which conducts a hearing, takes testimony and makes findings of fact, and certifies the record to the court having jurisdiction to review the matter.

11. In the absence of any appropriate statutory agency, a rule of court may require a reference to a master, following the practice outlined, even in jury cases, in new Federal Civil Rule 53. It was stated at the Institute on Federal Rules, recently conducted at Cleveland in connection with the Meeting of the American Bar Ass'n. that the use of masters in complicated cases as advisors to the jury (or court) has been satisfactory.

12. Other rules of convenience may be recognized or formulated, e. g., as to proof of business documents, notice of foreign law, etc.

13. The time seems to have come when a rule of reason should be recognized in the field of proof and evidence. Mr. Stephan appears to favor this suggestion.

Usually the court may take additional testimony and may make new findings on the whole record including such supplemental testimony.

In the opinion of the writer this system works well in actual practice, and, as a matter of policy, should not be disturbed. It appears to fill an intermediate need. The court has greater power than a court making review in equity on a closed record since it may take additional testimony. But in a zoning case, the court does not start de novo, as in a bill in equity to prevent the application of rates promulgated by a utility commission.

We accordingly suggest, as a matter of policy

SIXTH. Where the administrative agency itself conducts the hearing and takes testimony, as in zoning cases, the court in reviewing the proceeding should not necessarily be precluded from taking additional testimony.

Up to this point we have studied four types of review: (a) Review de novo (as in rate cases under claim of confiscation); (b) Review as in zoning cases (where the court may take additional testimony as of right, supplementing the evidence certified by the administrative board); (c) Review as in equity appeals (where the court, meeting the test of the Ben Avon case, re-examines the evidence in the closed record and makes its own findings of fact); and (d) Review as in certiorari (where the court looks at the record merely to see if there is competent evidence to sustain the findings of fact made by the administrative agency).

So far we have come to the conclusion that proceedings de novo are to be discouraged, and that reviews on certiorari as, above defined, are of doubtful validity in litigation between individuals involving private rights. (As distinguished from controversies between the government and its citizens, a matter hereafter considered).

We have not yet exhausted the list of typical cases of judicial review.

V

WORKMEN'S COMPENSATION APPEALS

Robinson Crusoe's visitor Friday did not, perhaps, have greater choice than the reputed Hobson, when he elected to stay and serve Mr. Crusoe instead of returning to the deep blue sea. Yet there is an historic element of free choice and election inherent in laws of the type of workmen's compensation statutes which differentiates them from other lines of civil controversies in the field of private right.

The comment of the Section of Judicial Administration made at the Cleveland Meeting of the American Bar Association is pertinent (at page 114 of its separately bound pamphlet):

"When we come to the workmen's compensation acts we note for the first time a definite trend against the granting of a review upon the facts. Historically the reason for this departure is quite plain. The first workmen's compensation act in this country was that of Wisconsin in 1911, and the provisions of this act set the pattern for many of the other states. The original Wisconsin act was purely elective on the part of both employer and employee and it was thought by the framers of the act that because acceptance of its terms made the obligation of employer contractual rather than one legally imposed, the virtual elimination of judicial review would be valid and would make for efficiency and expedition in the administration of the act."

Extended discussion seems unnecessary of the subject of judicial review of fact finding agencies the jurisdiction of which appears to rest, historically or practically, on voluntary acceptance. Accordingly, it is suggested:

SEVENTH. Where a fact finding administrative agency has been established the jurisdiction of which depends on actual or implied consent, as a matter of policy, judicial review of its findings and orders should be allowed in the manner which is customary under typical workmen's compensation laws, namely, the court examines the record to ascertain if there is competent evidence to sustain the findings made by the administrative agency, and does not re-examine the record for the purpose of making its own findings. This type of review is in the nature of certiorari. It ignores the test of the Ben Avon case. It is recommended, as a matter of policy only where (a) the administrative agency operates on two levels, fact finding units (such as referees) and a review board (such as the Workmen's Compensation Board); *and* (b) where, if the proceedings is a matter of private right between private parties, the whole proceeding rests, essentially, upon the agreement of the parties.

VI

CONTROVERSIES BETWEEN THE GOVERNMENT AND THE CITIZEN

In the earlier discussion care has been taken to make it clear that the suggested rules were limited in their application to controversies between persons as a matter of private right.

There is a broad realm in which one party to the controversy not only does not have constitutional rights (such as those recognized in confiscation cases) and does not carry on his affairs and enjoy private rights subject merely to the regulatory power on the part of the government (as in the case of commissions which regulate business), but where one litigant is in a position of acknowledged inferiority in dealing with his adversary, for the latter is clothed with the power of sovereignty itself.

Chief Justice Hughes makes this manifest in *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, at page 50 (page 612):

"As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." * * * * * "But the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals. Ex parte Bakelite Corp. 279 U. S. 438, 451, 73 L. ed. 789, 794, 49 S. Ct. 411. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans."

Mr. Justice Brandeis, in his concurring opinion in the St. Joseph Stockyards case, already cited, discusses the various fields of law in greater detail, saying at page 81 of 298 U. S. (page 1056 of 80 L. Ed.):

"These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on ex parte casual inspection or unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi-judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. It has recognized that there is a limit to the capacity of judges; and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the findings of facts is left, by the Constitution, in large part to laymen. It has enquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare *Humphrey v. United States*, 295 U. S. 602, 628, 79 L. ed. 1611, 1619, 55 S. Ct. 869. And where that prescribed for the particular class of cases appeared 'appropriate to the case, and just to the parties to be affected,' and 'adapted to the end to be attained,' *Hagar v. Reclamation Dist.* 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 S. Ct. 663, the Court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus, the Court has followed the *rule of reason.*" (italics supplied)

The present writer is impressed with the soundness of the distinctions made in the foregoing opinions. We therefore add to our list of specific suggestions:

EIGHTH. The "rule of reason," already suggested as the test of the admissibility or exclusion of evidence before an administrative board, or official, is to be applied generally in civil controversies between a citizen and the government conducted before or under the control of an administrative body.

NINTH. As a matter of policy it is also submitted that machinery should be provided for the prompt review by an independent agency of the findings of fact and of orders and assessments based thereon, including orders granting, revoking or cancelling licenses, in all cases of civil controversies between a citizen and the government. The independent agency exercising such review should be given power to proceed de novo, and the administrative official whose acts are being reviewed should not be a member of and should not have any power of appointment over the reviewing agency. The agency thus given power of review need not be a judicial tribunal or constitutional court. It may be a body such as the Board of Tax Appeals, or a board of revision of taxes.

TENTH. Where a power to review the facts has been conferred upon an agency meeting the requirements stated in the foregoing rule, as a matter of policy a further review by a court should be permitted upon petition to be presented to the court in a manner analogous to the present practice of petitions for certiorari to the United States Supreme Court. The allowance of such a petition for certiorari or review should be a matter of discretion and not a matter of right. But where certiorari has once been allowed the court should have full power to review and decide the matter, including, in its discretion, the power of taking of testimony or proceeding de novo, or otherwise disposing of the controversy. There should be no necessity for sending the proceeding back to the administrative agency for the purpose of taking additional testimony.

VII

RECAPITULATION AS TO FIVE TYPES OF JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATIONS

The five types of judicial review already considered appear, in the mind of the present writer, to be adequate, as a matter of policy, to cover every class of proceedings in the realm of administrative law.[14] Let us restate them:

Type I

Strict certiorari as a matter of right, the court being limited to ascertaining that there is competent evidence in the record to sustain the findings of fact: (Typical illustration: Workmen's Compensation cases). Applicable, it is submitted, only where there is an element of consent, *and* where likewise there is a board of review acting independently of the testimony taking officials.

Type II

Strict certiorari as a matter of right, but under such circumstances that the court has full discretionary power to dispose of the whole controversy, and where the court is a trial court to take additional testimony (as in zoning appeals) or to act de novo (as in proceedings in equity in confiscation cases). (Closest illustration: zoning cases bearing in mind the analogy of taking testimony in habeas corpus cases.) Applicable, it is suggested, in all cases of controversy between the government and the citizen, including federal tax appeals (from the U. S. Board of Tax Appeals), real estate tax appeals (from board of revision of taxes), and in proceedings of review in tariff and customs matters, and wherever one side of the controversy exercises the powers of sovereignty. The basic reason for this type of review rests in the necessity that government must go on. Permitting review by petition as a matter of grace discourages recourse to the courts, but allows the court to do full justice as occasion arises. The rule of the Ben Avon case does not, it is believed, apply to proceedings appropriate for this second type of review.

Type III

Review as in equity appeals upon a closed

14. The list is not exhaustive. The Supreme Court of Pennsylvania in Colteryan Sanitary Dairy vs. Milk Control Commission, May Term 1938, No. 38, not yet reported (June 30, 1938), in upholding the Penna. Milk Control Law (Act of January 2, 1934, P. L. 174) regulating the milk industry came to the conclusion that the administrative agency could take testimony, and on appeal, the court could take additional testimony, but that: "It was not the intention of the legislature that dealers or producers should withhold evidence at such hearing (before the Board), and then on appeal, submit that evidence to the Dauphin County Court, thus presenting an entirely new case, and forcing the court to exercise legislative powers."

record, where the court examines the testimony and makes its own findings of fact. (Typical illustration: Review of determinations made by administrative agencies acting under the police power or the interstate commerce power in regulating business.) Applicable, it is submitted, to nearly every type of administrative agency enforcing business regulations; including agencies of legislative character, such as a utility commission or a milk control board; likewise including all rate-fixing and price-fixing agencies. This should be the standard type, and reasons for resort to other types should be clearly stated and understood.

Type IV

Review as in zoning cases, upon an open record, in regard to which the court may take additional testimony. (Typical illustration: Review by the court of appeals from zoning boards of appeal.) Applicable, it is submitted, in zoning cases, and to other administrative determinations in controversies between private parties where there is no independent board reviewing the facts as determined by separate agencies (in the sense that workmen's compensations board is independent of the referees, and a labor relations board may be deemed independent of examiners who make definite reports and findings which are accessible to both parties).

Type V

Review by proceedings de novo, in which the court, (as in an injunction proceeding against confiscating rates promulgated by a utility commission) starts anew in the taking of testimony, although the plaintiff has already participated actively in the proceedings before the commission which resulted in the establishment of the questioned rates. It is submitted that this type of review is no longer to be deemed a constitutional necessity (except in the rare case of the initial attack upon some new type of administrative agency, an exception recognized in *Euclid v. Ambler Realty Co.*, already cited). If not needed for constitutional reasons it is suggested, that as a matter of policy, its use should be discouraged as not being a convenient mode for reviewing administrative determinations.

In the opinion of the present writer the chaotic condition of the law as to judicial review of fact-finding agencies may be speedily resolved by recognizing that there are five chief types of agencies of which the first four appear to be sufficient to serve as modes of review in all classes of cases.

The attention of the legal profession is invited to the possible advantages of reshaping the statutory law so as to fit the various classes of cases into the four types. Part of the difficulty has been the vague hope of building a Procrustean bed of proper length for every administrative determination.

In the event that the time has come to adopt a definite policy in this field, the ten specific suggestions already submitted may turn out to be material for the consideration of those who use blue pencils.

In closing it may be appropriate to add a few words on the question of bonds, on the printing of the record, and on the selection of courts to which appeals should be taken from administrative orders. The suggestion is made that the requirements as to bonds should be reduced to a minimum, following as closely as possible the present practice in this particular of petitions for review of income tax assessments to the Board of Tax Appeals, and in effect that no bond should be required except for extraordinary reasons upon cause being shown. A prompt appeal should act as a supersedeas without bond, and this should apply in all controversies between the government and the citizen. Only in cases which in effect are controversies between individuals in the exercise of private rights should a bond, even for costs, be demandable.

When a court reviews an administrative determination the original typed record should be certified, and it should not be necessary to print the record. Either party should have the privilege in his brief of printing such part of the record as he may desire, but the taxable costs in regard to briefs and records should be sharply limited by rule of court.[15]

The particular courts to which a petition for review may be presented from the action of an administrative board or official should be determined on the basis of convenience. The present system in regard to court review of the Board of Tax Appeals, giving the appellant the choice between the circuit court of appeals of his residence or the equivalent court in the District of Columbia, should not be disturbed.

Where the court may take additional testimony the review should be to the highest trial court of the county or district in which the appellant resides.

If the system of appeals in workmen's compensation cases is deemed satisfactory, it should not be disturbed. Otherwise, since the hearing is upon a closed record, the review may well be to the intermediate appellate court, if there is one, otherwise, to the highest appellate court. The same holds true of any other type of appeals on a closed record, such as appeals from utility commissions or milk control boards, particularly when the area affected exceeds the boundaries of a single county or judicial district.

15. Such as $10 minimum and $100 maximum, the court to fix the amount between these limits.

HENRY P. CHANDLER
Chairman, Section of Municipal Law

REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES

THE Judicial conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218), convened on September 29, 1938, and continued in session for three days. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge George H. Bingham.

Second Circuit, Senior Circuit Judge Martin T. Manton.

Third Circuit, Senior Circuit Judge J. Warren Davis.

Fourth Circuit, Senior Circuit Judge John J. Parker.

Sixth Circuit, Senior Circuit Judge Xenophon Hicks.

Seventh Circuit, Senior Circuit Judge Evan A Evans.

Eighth Circuit, Senior Circuit Judge Kimbrough Stone.

Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.

District of Columbia, Chief Justice D. Lawrence Groner.

The Senior Circuit Judges for the Fifth and Tenth Circuits, Judges Rufus E. Foster and Robert E. Lewis were unable to attend, and their places were taken respectively by Circuit Judges Samuel H. Sibley and Orie L. Phillips.

The Attorney General and the Solicitor General, with their aides, were present at the opening of the Conference.

State of the Dockets.—Number of Cases Begun, Disposed of, and Pending, in the Federal District Courts

The Attorney General submitted to the Conference a report of the condition of the dockets of the district courts for the fiscal year ending June 30, 1938, as compared with the previous fiscal year. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The report of the Attorney General disclosed the following comparison of criminal and civil cases (exclusive of bankruptcy cases) commenced and terminated during the fiscal years 1937 and 1938:

	Commenced		Terminated	
	1937	1938	1937	1938
Criminal	35,369	34,099	35,351	34,214
Civil	32,672	33,409	37,393	38,155

We noted last year the decrease in the number of cases pending in the district courts at the close of the fiscal year, and the figures for the year ending June 30, 1938, show a further decrease, as follows:

Pending Cases	1937	1938
Criminal cases	11,011	10,896
United States civil cases	12,623	11,285
Private suits	27,995	24,587
Bankruptcy cases	54,274	54,277
Total	105,903	101,045

Arrearages.—Delays in the Disposition of Cases

We called attention last year to the improvement that had been made with respect to the approximate time required to reach the trial of cases after joinder of issue. While in the fiscal year 1934 there were only 31 districts of which it could be said that all cases in which issue had been joined and which were ready for trial could be tried not later than the term following the joinder of issue, it appeared last year that this was true of 68 of the 84 districts, exclusive of the District of Columbia. Substantially the same may be said this year.

The Attorney General points out that the tabulations showing the minimum length of time between joinder of issue and opportunity for trial do not adequately disclose the real state of the dockets with respect to arrearages and delays. The Attorney General notes the misnomer, in previous tabulations, in describing dockets as "current" merely because cases can be tried at the term following joinder of issue. Thus, it is observed that there are many districts in which the trial dockets are up to date and yet litigants may have to wait from six months to a year after issue is joined in order to obtain trial. This is said to be due principally to long intervals in certain districts between terms of court. And the tabulations above mentioned do not take into account the cases continued at the request of the parties or the period that is absorbed by preliminary proceedings before joinder of issue.

In order to give a more adequate picture of the state of the dockets, the Attorney General has submitted a table—now presented to the Conference for the first time—showing the status of the civil cases pending on June 30, 1938. From this table it appears that of the 35,872 civil cases pending on that date there were only 11,660 that had been pending for six months or less, while 24,212, or 67%, had been pending for six months or over; 18,017 cases, or 50.2%, for a year or more; 11,374 cases, or 32%, for two years or more; 7,741 cases, or 22%, for three years or more; 5,910 cases, or 16%, for four years or more; and 4,720 cases, or 13%, for five years or more.

The Attorney General classifies the delays as being of three types, (1) those between the beginning of suit and joinder of issue, (2) those between joinder of issue and trial, and (3) those in the disposition of matters that have been submitted to the court. The Attorney General feels justified in expecting that the first sort of delay will be substantially reduced as a result of the adoption of the new Rules of Civil Procedure which went into effect on September 16, 1938. So far as the second and third types of delay have been due to congestion of dockets and the burden imposed upon judges they may be considerably remedied by the increase of judicial personnel. In the District of Columbia it is believed that through the provision for additional judges the large arrearages may be very considerably reduced during the ensuing year and soon after may be completely disposed of.

The Conference has carefully considered the tabulations furnished by the Attorney General and fully

appreciates the importance of adequate statistics upon this subject. The Conference is in entire agreement with the view that the new Rules of Civil Procedure, through a required simplification of practice, will diminish the delays that have heretofore occurred. The provision of Rule 16 for pre-trial procedure should have a most salutary effect. Under this Rule the district court may direct the attorneys for the parties to appear before it for a conference to consider (1) the simplification of the issues, (2) the necessity or desirability of amendments to the pleadings, (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, (4) the limitation of the number of expert witnesses, (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury, and (6) such other matters as may aid in the disposition of the action. The court is to make an order reciting the action taken by the conference and may establish a pre-trial calendar. Although this rule has been in effect for a very short time it has already been applied in at least one district with apparent success. If the District Judges avail themselves of this opportunity, and proceed in the manner contemplated, there is every reason to believe that the speedy and appropriate disposition of cases will be greatly facilitated. The real points at issue may be ascertained at an early stage of the litigation and arrangements be made to avoid all delays for unsubstantial reasons.

In considering the statistics with respect to the accumulation of pending cases, attention was directed in the Conference to some of the reasons why cases remain on dockets for a year or more. Thus, cases may be held to await a decision in some other jurisdiction, which would make a trial unnecessary or affect the rights involved, or to await the result of negotiations for settlement; foreclosure suits may be suspended by moratorium or redemption statutes; the litigation may be ancillary to that in another jurisdiction or may be held in abeyance because of bankruptcy or reorganization proceedings, or because of an injunction restraining parties from proceeding; cases may have been appealed and sent back for another trial; or, as frequently occurs, the continuances are by consent of counsel.

How important it is to analyze statistics in order to ascertain the exact circumstances of the cases to which they relate may be illustrated by the situation in one of the districts to which attention was directed in connection with the submitted table. It should be noted that as soon as this table was received (shortly before the meeting of the Conference) inquiries were made in certain instances in order to ascertain the reasons for the disclosed delays. The instance just referred to was that of the Western District of Missouri, where the table showed that out of 411 pending cases there were 240 which had been pending for more than a year and of these 168 cases had been pending for more than five years. On inquiry it appeared that of those last mentioned there were 140 cases involving certain insurance rates fixed by the state authority where it had seemed necessary for many separate suits to be brought. The cases were before a three-judge court and common principles of law governed all. After the merits had been finally disposed of by settlement, the mere administrative work of the distribution to a host of persons in interest under insurance policies of the huge fund accumulated under order of the court has required considerable time. It is understood that thousands of checks are being sent out monthly and the distribution is being made as rapidly as possible. With respect to the same district, other explanations were given to account for the delays in the remaining cases shown by the table.

While it is thus highly important, in order to appreciate the true significance of statistics as to the number of pending cases, to know their nature and the precise reasons for holding them on the docket, it is still believed to be true that there is a very large accumulation of cases which encumber the dockets and should have been disposed of long ago. The Senior Circuit Judges will take up this matter with the District Judges in their respective circuits. One remedy immediately at hand, which has proved effective in many jurisdictions, is to have the entire docket called at reasonable intervals so that the "dead wood" on the docket may be removed and the cases that are expected to be tried shall be brought to a speedy determination. Further, cases should not be kept on the docket for an inordinate time merely on the consent of counsel and in the absence of substantial reasons. The Conference adopted the following resolution:

"Resolved that it is the sense of the Conference:

1. That there should be a complete call of the docket at least once every six months in each judicial district or in each division of a district where there are divisions.

2. That the provisions of the pre-trial procedure provided by Rule 16 should be followed as far as practicable in connection with such call.

3. That reports as to such call of the docket should be made annually to the Senior Circuit Judge.

4. That where calls of the docket are not made by the judge of the district, the Senior Circuit Judge should assign some other judge to the district to perform that service."

Additional Judges Required

The Attorney General justly emphasized the importance of having a sufficient number of judges to dispose of the judicial work and has pointed to the relatively small amount that is expended by the Government in the maintenance of the Judicial Department.

Provision for Circuit Judges

The Conference in 1937 recommended that provision be made for one additional circuit judge in each of the Second, Fifth, Sixth, and Seventh Circuits.*

Congress provided for those judgeships and also for an additional associate justice for the Court of Appeals for the District of Columbia and removed a restriction against the filling of a vacancy when it occurs in the office of circuit judge for the Third Circuit.

The reports of the Senior Circuit Judges show that in general the Circuit Courts of Appeals are up with their work. No additional judges are required in seven of the circuits or in the Court of Appeals for the District of Columbia. The Circuit Court of Appeals for the Sixth Circuit has a large accumulation of cases and it is apparent that in order to secure the prompt disposition of its work an additional judge will be needed even after the existing vacancy is filled. The Circuit Court of Appeals for the Seventh Circuit has kept up with its work through the assistance of district judges. The latter, however, are needed in the district

*Editor's Note: This list is printed in condensed form.

courts. There is an existing vacancy but still another judge is required. Again, the Circuit Court of Appeals for the Eighth Circuit has been able to keep abreast of its work only through the aid of retired judges. It now appears that dependence can not be placed upon their continued ability to render this service and provision should be made for two additional circuit judges there.

Accordingly, the Conference recommends that there should be provision for one additional circuit judge in each of the Sixth and Seventh Circuits and for two additional circuit judges in the Eighth Circuit.

Provision for District Judges

In 1937 the Conference recommended that one additional district judge be provided for each of the following districts:

Northern District of Georgia, Eastern District of Louisiana, Western District of Louisiana, Southern District of Texas, Eastern District of Michigan, Northern District of Ohio, Western District of Washington, Southern District of California, and the District of Kansas; and 3 additional district judges for the District of Columbia.*

Accordingly Congress made this provision except in three instances: the Northern District of Georgia, the Northern District of Ohio, and the District of Kansas. Other additional judgeships were created by Congress as follows:

1 additional district judge for each of the following districts: Northern District of Alabama, with the proviso that no successor shall be appointed to the present senior judge, Northern District of Illinois, Western District of Virginia, Northern District of California, Southern District of New York, with the proviso that the first vacancy occurring in that District shall not be filled, the District of Massachusetts, with the proviso that the first vacancy occurring in that District shall not be filled, 1 additional district judge for the Eastern and Western Districts of Arkansas, and 1 additional district judge for the Eastern and Middle Districts of Tennessee, with the proviso that no successor shall be appointed.*

Congress also made permanent a temporary judgeship for the District of Montana, and removed the prohibition against the filling of a vacancy when it occurs in the office of district judge for the Eastern District of Pennsylvania.

The Conference gave close consideration to the extent of the need for still more district judges, having regard to the volume and character of the work in the districts and the need for the prompt disposition of cases. The Conference renews its recommendations for additional judges for the Northern District of Georgia and for the District of Kansas. Despite the relief already afforded in the Southern District of California and the Southern District of New York, further judicial assistance is necessary in view of the heavy dockets in those districts. In the Southern District of New York there has been reliance upon the assistance furnished through the assignment of judges from other circuits, but inquiry shows that it is impracticable to obtain this relief to the extent needed. Other increases are found to be advisable in the District of New Jersey, the Eastern District of Pennsylvania, the Eastern District of Missouri, and the Western District of Oklahoma.

Including the recommendations made last year and now renewed, the Conference therefore recommends that additional district judges be provided as follows:

2 additional district judges for the Southern District of New York, 1 additional district judge for each of the following districts: the District of New Jersey, Eastern District of Pennsylvania, Northern District of Georgia, Eastern District of Missouri, Southern District of California, Western District of Oklahoma, and the District of Kansas.*

*Editor's Note: This list is printed in condensed form.

Court Rules

The adoption of the Rules of Civil Procedure necessitates changes in the rules of the respective Circuit Courts of Appeals and the District Courts. With respect to the Circuit Courts of Appeals, while each circuit may adopt such rules as are found to be immediately necessary to conform to the new procedure, it is the sense of the Conference that the rules should be made as uniform as practicable and to this end the rules adopted in each circuit should be at once communicated to all the other Senior Circuit Judges. The Conference appointed a committee which, on reviewing the rules of the several circuits, will undertake to make recommendations in order to secure the desired uniformity. This committee is composed of Circuit Judges Parker, Hicks, Wilbur, and Phillips.

The Attorney General has called attention to the importance of simplifying the procedure in the conduct of cases in the Circuit Courts of Appeals other than those coming from District Courts. The Attorney General has offered his assistance in securing uniform and appropriate procedure in such cases and the committee appointed by the Conference to deal with the subject of rules, as above noted, will collaborate with the Attorney General for this purpose.

In the amendment of the rules of the respective District Courts it is important that regard should be had to simplicity. It is the sense of the Conference that these rules should be made in the spirit which has governed the adoption of the new procedure; the rules should be few, simple and free from unnecessary technicalities. The Senior Circuit Judges will communicate with the District Judges in their respective circuits to secure uniformity of rules within the circuit and the Conference appointed a committee of District Judges which will examine the various district rules and make recommendations so that the greatest practicable degree of uniformity throughout the country may be secured. This committee is composed of District Judge John C. Knox of the Southern District of New York, District Judge William P. James of the Southern District of California, and District Judge Robert C. Baltzell of the Southern District of Indiana.

The Revised Bankruptcy Act

Rules will also be required to meet the provisions of this Act. It is understood that the Supreme Court will in the near future promulgate its amended General Orders and forms, in the light of which local rules may be formulated.

The Attorney General, in accordance with the request of the Chairman of the Securities and Exchange Commission, informed the Conference that the Commission was ready to perform the duties which the new Act imposed upon it and desired to assist the courts in every possible way in the protection of the rights of security holders. The Attorney General also stated that he had issued a circular of instructions to

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the United States Attorneys calling their attention to the duties which the Act imposed upon them.

At the last Conference a committee was appointed to cooperate with the committees of the Senate and the House of Representatives, respectively, which have been appointed to study the organization and operation of federal courts. It has been thought probable that the boundaries of existing circuits and districts would become the subject of consideration. The committee appointed by the Conference to deal with this subject has been continued.

The Conference recommended that § 212 of Title 28 of the United States Code should be amended so that, in a circuit where there are more than three circuit judges, the majority of the circuit judges may be able to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable.

The Attorney General directed attention to the bill introduced at the last session of Congress (S. 3212) for the establishment of an administrative office of the United States courts, and, while not objecting to modifications and improvements, the Attorney General strongly endorsed the objectives of the measure in the hope that these might have the approval of the Conference.

One of these objectives is to give the courts the power of managing their own business affairs and to that extent to relieve the Department of Justice of that responsibility. The Attorney General thought it bad in principle and practice that the chief litigant before the courts should have the control of the financing, the budget, the accounting and all the other details which are so intimately a part of the judicial administration.

Another objective is to secure an improved supervision of the work of the courts through an organization under judicial control. These objectives, as well as the provisions of the bill in question, were fully discussed in the Conference. In order to attain the desired ends, and to meet such objections as had been urged to the pending measure, the Conference provided for the appointment of a committee to prepare a recommendation, subject to the approval of the Conference, "having in view the incorporation of the provisions of the present bill looking to the transfer of the budget from the Department of Justice to the administration of the courts by some proper means, and, likewise, embracing a provision looking toward the establishment of Judicial Councils or some other like method within the several circuits and the District of Columbia for the control and improvement of the administration of justice therein." This work on behalf of the Conference is to be prosecuted in collaboration with the Attorney General. The committee is also authorized to submit any recommendations that are cognate to the matters above mentioned.

This committee is composed of Chief Justice Groner of the United States Court of Appeals for the District of Columbia, and Senior Circuit Judges Manton, Parker, Evans and Stone.

The Conference recommended that the Congress fix the sum of not more than $3,000 per annum as the amount that may be paid to law clerks of circuit judges. The Conference also recommended that an appropriation be made for the salaries of law clerks of district judges in accordance with the statute where the appointment of such clerks is approved by the Senior Circuit Judge.

The Attorney General presented the subject of the disparity between sentences imposed in different districts by different judges for practically the same offense committed under similar circumstances. Apart from the apparent failure to administer equal and exact justice in such cases the Attorney General called attention to the disciplinary problem that was thus created for the Federal Bureau of Prisons. No particular recommendation was submitted but the study which had been undertaken in the Department of Justice was made available to the Conference. The Conference considered the subject and the obvious difficulties that are involved in suggesting a remedy. The Conference recommended that the Senior Circuit Judge in each circuit should make the subject a matter of careful consideration in consultation with district judges so that the disparity in sentences should be removed so far as practicable and welcomed the aid of the Department of Justice in this endeavor.

The Conference renewed its recommendation of last year upon this subject, as follows:

"We approve in principle the appointment of a Public Defender where the amount of criminal business of a district court justifies the appointment. In other districts the district judge before whom a criminal case is pending should appoint counsel for indigent defendants unless such assistance is declined by the defendant. In exceptional cases involving a great amount of time and effort on the part of counsel so assigned, suitable provision should be made for compensation for such service, to be fixed by the court and to be a charge against the United States."

The Conference adjourned subject to the call of the Chief Justice.

For the Judicial Conference:

Charles E. Hughes,
Chief Justice.

October 1, 1938.

MABEL WALKER WILLEBRANDT
Chairman, Committee on Aeronautical Law

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

A Migratory Criminal Disbarred

In an original proceeding (not yet reported) brought by the Dallas Bar Association through its Enforcement Committee, the Supreme Court of Texas recently disbarred an attorney (Oren Parmeter) on the ground that the attorney had procured his license ten or twelve years before by fraud. It was charged that, with intent to mislead the Board of Legal Examiners and the Court he had misrepresented the facts as to his place of birth, his general and legal education and the length of the period during which he practiced law in Arkansas. It was also charged that the attorney filed an affidavit stating that he had never been convicted of a felony, when in fact he had been convicted of bigamy in Ohio, forgery in the second degree in New York, and grand larceny in Minnesota.

Commenting upon the decision in an editorial entitled, "Purging That Is Desirable," the Dispatch-Journal on September 8, said:

"Action of the Dallas Bar Association in obtaining the revocation of the license of a local lawyer climaxes a three-year fight carried on against almost insurmountable odds by the grievance committee composed of Searcy Johnson, Bill Bower, Will Wilson, and Shelby Cox.

"This committee is to be commended for its work, which combined an efficient type of detective work in gathering evidence against the disbarred attorney and a tenacity in pressing the charges which were finally rewarded in the Texas supreme court's action for disbarment.

"The charges against the attorney thus deprived of his license to practice law in this state were indeed serious enough to warrant this drastic action—perpetrating a fraud on the court by representing that he never had been convicted of a felony, when, as a matter of fact, he had been convicted of felonies three times and served three terms in various state institutions.

"It is necessary for all professions, in order to merit and hold public confidence, to see that its members uphold the ethics of that profession."

This case shows the need for the collection of information, in some national agency, concerning lawyers who have been disbarred, such as has been established by the National Conference of Bar Examiners.

If regular reports of disbarments were made to that agency, inquiry of it when attorneys seek to be admitted on certificate would doubtless soon become routine with the consequence that successful fraud would become very infrequent.

Illinois Appellate Court to Wear Robes

The Amended Rules of Practice of the Appellate Court for the Fourth District of Illinois, effective August 1, 1938, provide that the Court shall wear robes, as follows:

"Rule 40. Judicial Robes. Each Justice of this Court shall, when sitting upon the bench, wear a suitable judicial robe made of black silk and of the pattern usually worn by the Justices of the Supreme Court."

Lawyers Listings in Telephone Directories in Boldface Type Considered

The so often raised question as to whether an attorney may properly have his name listed in a telephone directory in boldface type was recently considered and answered in the negative by the Committee on Professional Conduct and Legal Ethics of the Bar Association of the District of Columbia. In Opinion No. 1, the Committee, after quoting a part of Canon 27 said, in part, as follows:

"When a subscriber who is a business or professional person contracts for telephone service his name is listed in two groupings of the directory, first, in the general alphabetical section, and secondly, in the classified section, wherein all subscribers handling similar kinds of merchandise or performing similar kinds of service are listed alphabetically under an appropriate heading. Both of these listings are incidental to the subscriber's contract for telephone service, and are called "regular" listings. It will be noted that the "regular" listings in each of the sections are uniform, as far as the general style, size of type, etc., are concerned. There can be no doubt that such listings of a lawyer's name and telephone number are entirely proper, inasmuch as there is nothing to distinguish the name of one lawyer from that of another, and the public convenience is served thereby.

"While all listings in the alphabetical section of the directory are in the same type face, subscribers may contract for special treatment of their listings in the classified section, which special treatment consists of any change from the regular listing and may constitute a listing in boldfaced type or an advertisement covering an entire page. The whole purpose and natural result of any such special treatment is to make such listing stand out from the other contents of the page; to make easily distinguishable to the reader the name of the person so listed from that of another; to draw attention to the person so listed; and to make a special bid for public notice. This is as true in the case of a boldfaced listing as in the case of a larger advertisement. * * *

"Your committee, therefore, is of the opinion that when a telephone subscriber obtains the special treatment of a boldfaced listing, he is, in effect, replacing the "regular" directory listing by an advertisement, and is indulging in advertising contrary to Canon 27 quoted above. The practice of employing boldfaced listings in the classified section of the telephone directory should, in the opinion of your committee, be avoided by members of this bar."

More Bar Associations Active in Public Relations Work

The California State Bar has recently committed itself to a broad public relations program. Newspapers, radio and public addresses will be the media through which an effort will be made to acquaint the public with the training, duties, responsibilities of lawyers and their associations and was characterized by the Bar's Public Relations Committee as "the most important step the State Bar can take."

The program contemplated will be carried out under a public relations director. Whether the organization's dues will be increased by $2.50 a year to defray the expense of the program is to be left to a plebescite.

The Public Relations Committee of the Cleveland Bar Association has been appointed to carry out a similar program. Its Committee has been subdivided into sub-committees on Radio Broadcasts, Programs and Speakers for Meetings of Luncheon and Service Clubs, Programs and Speakers for Miscellaneous Clubs and meetings, Schools and a Committee to Deal with the newspapers.

COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES
H. W. ARANT, Chairman.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
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IMPROVED ADMINISTRATIVE ORGANIZATION IN THE FEDERAL COURTS

Members of the profession of law will generally be pleased that the recent sessions of the Judicial Conference presided over by the Chief Justice took steps to preserve and advance the essential objectives sought by the bill recommended by Attorney General Cummings for the creation of an "administrative office" of the Courts of the United States, with a director to be selected by the Supreme Court. Although the bill was supported last winter by representatives of the American Bar Association under the mandate voted by its members and by non-member lawyers in the 1937 referendum, the objections made to some provisions of the bill were such as to lead to a conclusion that it should be further studied before enactment. The Judicial Conference took cognizance of these objections and sought a revision of the bill "in order to attain the desired ends and to meet such objections as had been urged."

The provisions of the bill by which the budget of the Federal Courts would be transferred from the Department of Justice to the administration of the Courts have been widely approved as a sound and salutary step in behalf of the independence of the judiciary. The Judicial Conference appointed a committee from its membership to collaborate with the Attorney General in preparing a recommendation, to be subject to the approval of the Conference, for the accomplishment of this transfer "by some proper means."

Evidently in view of the criticisms which have been directed against establishing a centralized supervision of the calendars and work of the Courts, the resolution of the Conference withheld support from the proposed "administrative office" as such, but authorized the drafting of a recommendation "looking toward the establishment of judicial councils or some other like method within the several circuits and the District of Columbia for the control and improvement of the administration of justice therein." Through the setting up of judicial councils "or some other like method" in the respective circuits, it is hoped to improve the organization of the Courts without impairing in any way the independence of the circuits in proper respects and their reasonable amenability to local conditions and customs of practice.

Members of the American Bar Association, as well as non-members, preponderantly supported the Attorney General's recommendation for a proctor or "administrative office," but the mature conclusion of the Judicial Conference evidently favors examination of what could be done through "judicial councils or some other like method" within the circuits.

Noteworthy indeed is the resolution adopted by the Conference, which provided in substance that

1. A complete call of the docket should be made at least once every six months in each Federal judicial district or division thereof and the results of such call reported to the Senior Circuit Judge. In the event the call is not made, the Senior Circuit Judge should appoint some other judge to the district to perform that service.

2. The continuance of cases by agreement of counsel "for an inordinate time" or in the absence of substantial reasons, should be discouraged.

3. The pre-trial procedure outlined in the new Rule 16 should be followed as far as practicable in order to encourage conferences between counsel and the Court to simplify issues, limit the number of expert witnesses, and determine the necessity or desirability of amending the pleadings.

The Conference also appointed a committee of its members to review the rules of the District Courts, with a view to their revision in the interests of clarity, simplicity, and possibly greater uniformity. Other actions taken

by the Conference are shown in its report, which is published elsewhere in this issue.

Following on the taking effect of the new Rules of Civil Procedure, the heartening action of the Judicial Conference in 1938 gives promise of effective cooperation in behalf of the further improvement in the administration of justice in the Federal Courts. The reports and recommendations submitted to the 1938 meeting of the American Bar Association should be studied carefully by all lawyers, because they point the way to similar advance in the administration of justice in the State Courts.

PRESIDENT HOGAN CALLS FOR NEW MEMBERS

At the Cleveland meeting, the By-Laws of the Association were amended by adding to Article X, Section 1, a paragraph reading as follows:

"The President shall appoint annually for each state and the territorial group a Membership Committee whose duty it shall be to encourage desirable applications for membership. The respective Membership Committee shall be under the supervision of a General Chairman appointed by the President."

Mr. Silas H. Strawn, of Chicago, former president of the American Bar Association, has accepted the office of General Chairman of the Membership Committees of all of the states.

The popularity of the institute work sponsored and inspired by the Association is counted on to greatly aid in increasing the Association membership everywhere. It is part of the Association's permanent program to extend the plan of holding institutes and symposiums on live current legal subjects. The attendance of practicing lawyers at the several institutes thus far held on the new Federal Rules of Civil Procedure has been gratifyingly large. During the rest of the Association year this and other present day important subjects will be part of the Association's campaign for advanced legal education, the purpose of which is to keep the practicing lawyer thoroughly up to date in the work of the profession.

Under the generalship of Silas Strawn, the Association's Membership Committee in every state is expected to meet the state's membership quota.

President Hogan, through the JOURNAL, now appeals to every individual member of the American Bar Association to obtain and send in at least one new application for membership. The Association is rendering an ever-growing service to the profession and this can be continued and broadened only by the support of the profession. There is no better way to support the Association's work than to become a member of it.

CANONS OF ETHICS BECOME AUTHORITATIVE RULES

When the American Bar Association adds to or amends its canons of ethics it is usual for state associations to make the same changes. Any serious conflict between the national and state canons might result in considerable embarrassment. It appears in an article in the Boston Bar Bulletin for September that no changes have been made in the Massachusetts canons in twenty years. In the interest of bringing them into accord with the ABA canons the author goes into the subject fully and gives an interesting account of the origin of the explicit code in this country.

The need was first voiced by Colonel Thomas Goode Jones, of Montgomery, Ala., who asked his state bar association in 1881 to appoint a committee to formulate canons. In 1883 the committee of three, headed by Colonel Jones, was appointed. The chairman was unable to attend the conventions in the next two years, and in 1886 consideration was again postponed "because it was discovered, when the time came for presentation, that part of the code had blown through an open window." In the following year the code was adopted with only two unimportant changes. The American Bar Association canons, said to follow the Alabama canons very closely, were adopted in 1908. Older members of the Association will recall the long and very useful attachment of Mr. Charles A. Boston to the ensuing work of developing the canons.

In recent years the canons of professional ethics have come to have the force of law in many states. In some inclusive state bars the canons, by formal adoption, are as much the law as the bar organization act itself. Where pertinent they serve the needs of courts. Their most complete value doubtless lies in the guidance afforded to practitioners and grievance committees, which may remedy error in conduct by a reprimand having a canon for its authority.

Where there are such disciplinary committees working under authority of statutes or supreme court rules the canons have a life and an influence never conceived by the lawyers who struggled a generation ago to formulate ethical precepts. And in such states it is no longer valid to say that a

formal course in legal ethics merely enables students to discover how closely they may skirt the reefs of misconduct. Sophistical defenses against complaints make no headway with official disciplinary committees, whose power to reprimand, privately or publicly, affords means for practical enforcement of the profession's standards. The freedom for complaint, the certainty of vigorous and unbiased investigation and the opportunity to put venturesome practitioners on guard constitute far more than does actual disbarment in inculcating good habits.

In the states having this machinery a lawyer's study of canons through casebooks teaches him what he may not do. If he thinks otherwise he is likely to find investigation and reprimand a very serious matter. Disciplinary committees are not concerned with stare decisis. While they serve when needed to effect disbarment, their greater function is that of actively promoting good conduct.

MID-WINTER MEETING OF THE HOUSE OF DELEGATES

With the multiplying activities of the American Bar Association and the preparation of reports by an increasing number of Sections and Committees, the experience of the annual meetings of 1937 and 1938 has indicated that adequate discussion and consideration of these many reports and their recommendations cannot take place in such sessions of the House of Delegates as can be held during the few days of an annual meeting. For the representative body of the Association and the profession to take routine and perfunctory action upon these varied subjects would deprive their action of authority and significance. This has wisely been avoided. The volume and importance of the recommendations on which the Sections and Committees seek the action of the House have, however, proved to be such as to make two or three afternoon sessions on hot and humid days in mid-summer wholly insufficient for the quality and extent of debate and deliberation which are essential for the development of a consensus of reasoned and mature opinion in the House of Delegates.

If the action of the House upon these reports is to represent a fair crystallization of opinion, time must be made available for eliciting fully the views of the delegates from State and local Bar Associations and for the leisurely discussion which is helpful in the formulation of good judgment. To leave the mid-summer calendar of the House so heavy and crowded as to create an impression of constant pressure to "keep schedule" and get matters disposed of, would be to invite decisions which in the long run would not command the confidence of the profession. At almost any hazard, the House traditions of open and adequate debate and the free expression of individual opinions should be preserved.

The judgment of members of the House in Cleveland was that this could be secured only by holding a mid-winter meeting of the House, at which the interim reports of several Committees dealing with subjects of major and urgent importance can be presented, discussed adequately, and acted upon with deliberation.

It seems likely that, at the sessions of the House of Delegates in Chicago on January 9 to 11, several of the major reports by Committees, including that on Administrative Law, will be presented and given the thorough consideration which their importance and specific character fully warrant. In turn, the taking of action upon these matters in January will lighten the calendar of the House next July and will clear the way for adequate consideration of the remaining matters in San Francisco.

A SERVICE OF IMPORTANCE

With this issue of the JOURNAL a new service to its readers is being initiated. Through the co-operation of the Attorney-General and the Department of Justice we are able to present to our readers an up-to-date summary of rulings and interpretations rendered by the Federal Courts on procedural points connected with the new rules. This will be a service of prime importance not only to the federal practitioner, but for every jurisdiction, state or federal, because federal procedure is now a composite of the best features of modern state procedure.

It will also be helpful wherever a movement is going on to assimilate the procedure of all courts to a common ideal in the hope of achieving practical uniformity in court methods throughout the land.

It is in line with what the Association has constantly been striving to do through the JOURNAL and otherwise, in giving its membership the kind of material which is helpful to the lawyer in the practice of his profession.

We acknowledge with great appreciation the cooperation of the Attorney General and of other officials of the Department of Justice, a cooperation which has made this service possible.

DECISIONS ON THE FEDERAL RULES OF CIVIL PROCEDURE

THE Attorney General of the United States has made available to the JOURNAL the first number of a bulletin which has been prepared by the Department of Justice giving a summary of decisions rendered in the federal courts on the new rules of civil procedure. Future bulletins will be regularly published or summarized in subsequent issues of the JOURNAL. The Attorney General's order, and Mr. Holtzoff's memorandum contain further explanation of this service.

Office of the Attorney General, Washington, D. C.
September 30, 1938.

Order No. 3176

A current compilation will be maintained in the Department of Justice of all rulings and interpretations rendered by the courts relating to the new Rules of Civil Procedure for the District Courts of the United States. Such compilation will be available to all attorneys of this Department, all United States Attorneys, Assistant United States Attorneys, and other Government attorneys, as well as members of the Judiciary, who wish to avail themselves of the service.

Mr. Alexander Holtzoff, Special Assistant to the Attorney General, is hereby designated to take charge of this service and to conduct correspondence in respect thereto.

HOMER CUMMINGS, Attorney General.

Memorandum

By Order No. 3176, issued on September 30, 1938, the Attorney General directed the installation of a service in the Department of Justice for the collection and dissemination of decisions construing or applying the Federal Rules of Civil Procedure. Accordingly, it has been planned that a bulletin be issued periodically containing such decisions as received.

Enclosed herewith is a copy of Bulletin No. 1. Additional copies will be gladly furnished on request.

Subsequent bulletins will be issued at frequent intervals.

The success of this service and its usefulness will depend to a large extent upon the promptness and completeness with which copies of decisions relating to the new rules are forwarded to us. The cooperation of the judges, United States Attorneys, clerks of courts, and secretaries to judges in this respect will be greatly appreciated.

ALEXANDER HOLTZOFF, Special Assistant
to the Attorney General.

October 12, 1938.

BULLETIN NO. 1, OCTOBER 12, 1938

Rule 19 (Necessary Joinder of Parties)

District of New Jersey

Sauer v. Newhouse, decided by Forman, D. J., on September 23, 1938.

Some of the directors of a corporation as defendants in stockholders' representative suit for restitution for losses caused by alleged mismanagement and dissipation of assets are not entitled to order that other persons be joined as defendants. Stockholders have not seen fit to bring such persons into action and ask for damages against them either in their official or personal capacity.

Only purpose of joining them as defendants would be avoidance of possible suit for contribution against them by present defendants in event of rendition of judgment against such defendants. Denial of defendants' motion that such persons be joined as defendants cannot prejudice such possibility. So long as stockholders refuse to make any claim against them, "it remains an ideal gesture to order them to appear."

Complete relief can be afforded stockholders against present defendants without addition of such persons. Hence, they are not necessary or indispensable parties.

Joinder is not required by Rule 19 (b) of Rules of Civil Procedure providing, in part, that "when persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties . . . the court shall order them summoned to appear in the action."

Rule does not compel joinder of omitted parties where complete relief, as in instant case, can be given as between present parties. It does not require that other persons be joined as defendants in order that complete relief may be given as between such persons and present defendants.

(*Editorial Note*: *The foregoing involves only the interpretation of Rule* 19, *Joinder of Parties. The application was for consolidation. The decision should not be taken as a limitation on the power of the court under Rule* 14, *Third Party Practice.*)

Rule 22 (Interpleader)

District of Maryland

John Hancock Mutual Ins. Co. v. Kegan et al, 22 F. Supp. 326,331, decided by Chesnut, D. J., on February 16, 1938.

"In the comment by the Advisory Committee to the Supreme Court on Rule 22 (1937 draft of the proposed new rules) it was said:

" 'The first paragraph provides both for strict interpleader and for actions in the nature of interpleader under the former equity practice. . . . This paragraph re-states the better practice on interpleader, as developed by judicial decisions.'

"While this new rule affecting federal equity and law practice is not presently in existence, it very clearly indicates that the existence of some interest of the plaintiff in an interpleader case falls within the field of legal practice and procedure rather than substantive law, and tends strongly to support the view that the existence of the interest should not be an absolute bar to the maintenance of the suit. It also indicates that the interest of the plaintiff does not of itself entitle the defendants to a jury trial. See Henrietta Mills v. Rutherford County, 281 U. S. 121, 127, 50 S. Ct. 270, 272, 74 L. Ed. 737; Matthews v. Rodgers, 284 U. S. 521, 529, 52 S. Ct. 217, 221, 76 L. Ed. 447."

Rule 33 (Interrogatories to Parties)

District of Massachusetts

Nichols v. Sanborn Co., decided by Ford, D. J., on September 30, 1938.

On objections to interrogatories served on adverse Party in a patent suit. Held, Rule 33 should be liberally construed. Evidentiary, as well as ultimate facts, may be demanded by interrogatories.

"There is no reason to grant an unlimited right to discovery by deposition on the one hand and restrict discovery under Rule 33 on the other hand. Rule, so construed, permits discovery as to evidentiary facts, as to facts relating to adversary's case, and as to identity and location of persons having knowledge of relevant facts. Rule that discovery could be obtained only of matters exclusively or peculiarly within knowledge or control of adverse party has likewise been changed.

"It is perfectly apparent that Rules 26 to 37, inclusive, of the Rules of Civil Procedure relating to depositions, discovery, depositions on oral examination and written interrogatories, interrogatories to parties, discovery and production of documents and things for inspection, copying, or photographing, and the admission of facts and genuineness of documents were formulated with the intention of granting the widest latitude in ascertaining before trial facts concerning the real issues in dispute, and permitting interrogatories to parties in connection with any relevant matter in order to make available the facts pertinent to the issues to be decided at the trial and eliminate all expense and difficulty that would be involved in their production at the trial.

"They were formulated with a view to simplifying the issues. With this same purpose in view the provisions as to pre-trial procedure (Rule 16) were adopted enabling courts to call the parties before them and cut away, by agreement and admissions of parties, all encumbrances to a speedy trial on simplified issues. . . .

"To keep in step with the purpose and spirit underlying the adoption of these rules it is better that liberality rather than restriction of interpretation be the guiding principle. This will avoid the confusion and complexities which have resulted as a result of the diversified interpretations of Equity Rule 58 by the courts."

Rule 86 (Effective Date)

Western District of Texas, El Paso Division

Oral announcement made by Boynton, D. J., on September 22, 1938, at El Paso, Texas.

"That he does not regard it essential or necessary to promulgate any written District Court Rule, at the present time, relating to matters of pleading in actions pending in this District prior to September 16, 1938, date the New Rules of Civil Procedure in United States District Courts went into effect; but in dealing with same will be governed by the language and spirit of the last clause of Rule 86 as applied to the situation arising in each particular instance and case.

"Further to effect that in all pleadings filed subsequent to September 16, 1938, in actions pending in this District prior to September 16, 1938, same should conform substantially to requirements of the new rules. That in such cases in which questions of pleadings may arise, or wish to be presented, same may be presented in form of motions or taken up on call of the appearance docket at various division points in the District where Judge Boyton resides, viz: El Paso, Waco and Pecos Divisions."

London Letter

Additional Judges

The Supreme Court of Judicature (Amendment) (No. 2) Act, 1938, which received the Royal Assent on July 29th, provides for the appointment of three additional judges of the Court of Appeal, thus increasing the strength of this Court to eight. But judges so appoint after the Act comes into force, other than *ex officio* judges, will sit and act in any Division of the High Court when requested so to do by the Lord Chancellor with the concurrence of the presiding judge of the Division. Such judges will, when members of the Privy Council, be eligible to serve also upon the Judicial Committee where additional judicial assistance is needed. The Act enables one vacancy among the six puisne judges of the Chancery Division to remain unfilled if the state of business in that Division does not require that the vacancy should be filled. It is expected that on the occureence of the next vacancy, it will be possible for the work of the Division to be performed by five judges. Arrangements are also made for the payment of the salaries and pensions of the additional judges. Judges of the Court of Appeal each receive a salary of £5,000 a year and a pension of £3,500. Their clerks receive £525 a year, without pension, but it has recently been suggested that steps should be taken to make the position of judges clerks pensionable.

Arrears in the Courts

That the appointment of three more judges is an urgent necessity is indicated by the fact that at the end of the last legal term there were nearly 1000 cases untried in the King's Bench Division, none of which can be heard till the Courts re-open after ten weeks vacation. Cases in other Courts still unheard bring the total of arrears to about 1,500, the highest number for many years. In the Divorce Court more than 400 cases are waiting till next term. Most of the arrears are non-jury cases, many of which were set down months ago. The heavy work at assizes has kept many of the judges away from London, and at one period of the term only three judges were sitting at the Law Courts. The constant and serious delays in the administration of justice are matters of much concern to business interests, and it has been pointed out by "The Solicitor" that expensive and delayed justice is bad justice, and that it is idle to have the best judiciary in the world if, because of faulty organisation, it is unable to discharge its functions effectively. It is to be hoped that the new appointments to be announced during the Long Vacation, will help to put an end to the delays at present experienced.

Additional Law Courts

Increases in the number of judges since the Law Courts in London were opened by Queen Victoria in 1882, have made further accommodation necessary, and it has been reported that four new courts are to be provided on the site now occupied by huts put up during the war on the grass plot at the west end of the Divorce Court. In addition it is proposed to convert the Bar Room into a Court. When the Courts were built this room was provided for the use of Members of the Bar as a place where they might take a last look at their briefs before going into Court, write letters,

(Continued on page 943)

ADMISSION TO THE BAR—BEFORE AND AFTER

Jacksonian Concept of Open Door to the Bar Followed Period of Fairly Rigid Requirements —Though It Still Shackles Us Remarkable Headway Has Been Made in Adoption of Higher Standards—The Bar Has Great Spiritual Assets in Both its Old and New Members—It Has Failed in its Public Relations, and in Sometimes Admitting the Unfit and Retaining the Unethical—Public Must Be Made to Understand Value of Legal Services and Trustworthiness of Bar and Bar Must Be Organized to Compete Successfully with Other Agencies*

By Dean Paul Shipman Andrews
of the University of Syracuse Law School

NOTHING perhaps more clearly sets apart the professions from business than the fact the professions have, as it were, patron saints, men and women whose greatness the world instinctively measures not by the money they have made but by their service to mankind. Education had its beloved teachers, from Irnerius of Bologna, and Abelard and William of Champeaux in Paris, down to the present day; nursing, its Florence Nightingale; doctors uncover at the names of Koch, of Trudeau, and a hundred others. And we lawyers, we, too, stand at attention as the long column marches by, coming across the centuries. Coke and Littleton, Mansfield, Pollock and Maitland, Marshall and Story and Taney, Holmes, and now Cardozo —the roll would be very long. But it is a great presence in which we carry on our profession of the law, a high company to which we belong. And there are many men alive today who will surely not be unwelcome in that presence—lawyers—some of them whose names are known throughout the land; some of them, perhaps not less welcome, whose only credentials will be the affection and respect of a few whom they have well served.

We can be proud of our profession. Law is the rule-book of the game of life. It is man's reaching out after the ideal of justice, ever nearer, ever still receding, ever just beyond the grasp of human hands. Justice is part of the unreachable divine; law, its human and weaker counterpart. How nearly, then, the law shall approach to its ideal depends on the human minds which guide its course—judges, lawyers, juries, witnesses, clients—and none touch it more directly than the lawyers. Men and women expect more of lawyers than they do of most other men. They expect integrity—that high sense of obligation, to the Court, to the client, to the public which by very instinct puts one's own interests last. And there are perhaps few better examples of how much of this the public gets from lawyers, than the self-sacrificing, often thankless, work of the Boards of Law Examiners.

But when our efforts at last have brought us to the horizon line which yesterday we looked at from afar, we see beyond, lands as green or greener, and ways as pleasant, and perils and toils perhaps as great, as those we had just traversed. Only when we stand still does the horizon cease to move. In an advancing world, the resting place after each day's fine effort is the horizon of the day before. To plan for the next day's travel does not belittle the conquest of yesterday.

*Address delivered at Cleveland, July 25, 1938, at the annual meeting of the National Conference of Bar Examiners.

Our Living Should Attest Our Realization of Change

We speak glibly of this as a fast-changing world. It would be profoundly important if, more than we do, we lived that belief. Yet the fact of change stands out on every hand. My grandfather was born in 1826, the year after the opening of the Erie Canal in New York State was heralded as the world's great transportation triumph. When in 1918 he died, he had known most of the material miracles which we take for granted today—the telegraph, the telephone, the growth of transportation by steam, the early horse-cars turning to trolleys and then to buses, the first free mail-carrier service in 1863, the typewriter in 1867, the telephone in 1875, flying, the radio, the growth of social responsibility. His vocabulary, his last dictionary, were filled with words new-coined to baptize the advances in mechanics, in chemistry, in material devices for comfort and the wellbeing of humanity.

Even since I was a boy, we have built the Panama Canal, opened the first transcontinental telephone line in 1915, laid the first Pacific cable, adopted parcel post in 1913; and in 1927 we heard a human voice across the Atlantic Ocean in radio telephony; and the silent moving-picture has taken on a voice. Such words as celotex, cellophane, rayon, duco, pyrex, have broken into the language. And yet in 1833 the then head of the United States Patent Office offered to resign his position because he felt that the limit of human invention had approximately been reached, and that there would be no further need for his services.

Nothing more clearly underlines the change than an article which appeared in an English newspaper in the year 1829, when George Stephenson's "rocket" engine ran on rails at the unheard-of-speed of 35 miles in 48 minutes, on the line between Liverpool and Manchester. Even if means were found, the paper said, "to abate one-half the violent shock in stopping, enough remained to terrify considerate men from risking their persons in such species of conveyance. Till we have bones of brass or iron . . . it is preposterous to talk of traveling 50 or 60 miles an hour as a practicable thing." It was stated as a notorious fact that the brains of business men were so addled by the swift journey from Manchester to London that oftentimes on arriving at the latter point they forgot what they had come for, and had to write home to find out. One elderly gentleman became, indeed, so impregnated

with velocity that he dashed headlong into an iron post and shattered it to fragments.

Early Standards of Preparation for the Bar

In these same days prior to 1830, a fairly rigid preparation for entrance to the Bar was required of an intending lawyer. In Massachusetts, for example, from 1810 to 1830, even college graduates were required to study three years in a law office, and others five years, before being admitted to practice. And study in a law office, sitting at the feet of the distinguished lawyers of the day, meant something far different from what it means now.

The Jacksonion reaction against privilege and class, against an aristocracy even of intellect, weakened or destroyed educational requirements for admission to the Bar, and left only the prerequisite of good moral character, of which the proof was no less perfunctory than it is today. But only a handful of lawyers sought admission then to the Bar, as compared with the avalanche of today.

The Jacksonian Concept Still Shackles Us

Even now we have not wholly freed ourselves from the shackles of the Jacksonian concept. Quite properly we feel that the doors of opportunity in the practice of law as in other fields should stand open to the sons of democracy, regardless of birth or wealth or creed. But democracy has not learned as yet that of some of its servants it must expect high qualifications of intellect and integrity, if it is to be well served. It has not come to realize the harm which an incompetent or unfaithful lawyer can do. The menace of inadequate medical training is obvious. One hardly would employ even a skillful butcher to perform an appendectomy on one's child.

But so great is the prestige and the appeal of the law in the eyes of American democracy, so eager it is for its sons to be members of the Bar, that it has forgotten that justice itself and liberty rest in the hands of the lawyers and of the judges who are drawn from among them.

Only in 1935 there was repealed a provision of the State Constitution of the great State of Indiana, which read, "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." To be sure, the Courts of that State exacted the right to examine applicants on their knowledge of the law as the price of exempting them from the ordeal of a jury trial on moral character. Again, until five or ten years ago, there was, and so far as I know there is until this day, in the Revenue Act of the State of Delaware a provision which reads, "The following fee shall be paid to the Clerk of the Peace for the use of the State for any license to be issued by him . . . for every license to perform or practice jugglery, the sum of $25.00; . . . for each license as a lawyer the sum of $10.00."

Great Progress from the Jacksonian Reaction

From those days and times, we have gone far. I need not detail in this presence the rise in intellectual requirements for admission to the Bar, the growth of the great law schools, the emergence of the teachers of law as a new and respected branch of the profession, objective in viewpoint, untroubled by the need to please clients, making their own, separate contribution to the development of the law. Justice Cardozo in "The Growth of the Law" illustrates what he calls "the power of the university to guide the course of judgment." Referring to the former supposed rule that in actions for specific performance there must be mutuality of remedy not merely at the time of the decree but at the making of the contract, he points out that it was the teachers of law who "exposed the dangers of the course that many of the courts were following." "Without the critical labors of Ames and Lewis and Stone and Williston, the heresy instead of dying out, would probably have persisted, and even spread. . . . What saved the day was criticism from without."

Law study, then, has changed beyond recognition to meet the changing times. And well it might change. For the purposes for which lawyers are being trained, the function of lawyers in the world today, the fields in which lawyers are called upon for help and leadership, these too have widened beyond the dreams of our forefathers. It is a far cry from those early days when a colonial statute of New York, as Justice Cardozo once pointed out, forbade the wealthy litigant of the then small community from hiring more than two lawyers, and thus ended the practice of hiring the entire Bar so as to deprive one's opponent of representation by counsel. If I may repeat what I have elsewhere said, the annual deluge of legal decisions and of statutes has made an ocean, the navigation of which calls for guides and aids on the one hand, and for training on the other, such as were not needed in earlier times. Some legal subjects, long taught as courses in our law schools, are gaining in importance day by day; and whole new fields of law are knocking for admission at the doors of an already crowded curriculum. Administrative law, tax law, labor law, public utilities law, and others are lusty infants crying for attention.

Broadened Outlook of Students of the Law

Furthermore, students of the law, both at the Bar and on the bench and in the law schools, are no longer satisfied to discover simply what the rule of law is, as established. For some time they have been trying to find how these rules work, how they serve the public, how the law fits into the scheme of things as one of the social sciences, how the existing law dove-tails with our notions of what government should be and should do. Then comes the whole field of legislation, in which lawyers are the most vital factor, asking how the law ought to be changed so as best to serve a fast changing economy. The needs of the business world, ever more complex and moving at an ever faster pace, for promptness and simplicity and certainty in the settlement of differences, have added to the demands upon a Bench and Bar already weighed down by the increasing burden.

And the quantity of legal advice needed and wanted by individuals—the kind of advice which the family lawyer used to give—has certainly not diminished. Wills, deeds, land contracts, titles, guardianships, and the rest, still need legal guidance. And questions of income tax, of electric rates, of freight rates, of municipal ordinances of various kinds, of the ever more complex rules and regulations under which we live, are arising every day to trouble the citizen.

But there is a further burden imposed upon the selective process, by the vastly increased number who seek admission to the Bar. We know, of course, that the law school population, the number of students, has of late been substantially cut down. We are not certain of the reason. But the number is still great

enough to present a serious problem and to constitute a burden on the selective process that I have mentioned.

Problems Which Offer Challenge and Opportunity

The gigantic complexities of modern business, the legal basis for a happier relation between capital and labor, between agriculture and industry; the framework of a system of distribution whereby the products of one section of our land can be brought to men and women lacking them in another section and the bug-bear of overproduction laid by a cutting of the cost; the necessity of teaching the great industries and the little to work together with each other in the harness of a sense of social responsibility; the searching of the sciences of chemistry, of physics, of politics and economics, of that new infant of prodigious possibilities, psychiatry, and the rest, for new light to throw on ancient problems of the law, in the hope that legal procedure, simple, swift and sure will at last reach the goal toward which already it has come so far of making a trial in Court a scientific search for justice, and that justice herself more often shall visit her house of the law—these and a hundred others are the opportunity and the challenge of the law.

Physicians, pressed by the multiplication of new skills and new learning required of them, have turned to specialization. Perhaps on them the pressure is greater, because a doctor cannot well satisfy his ailing patient by promising to look up in his library the nature of the illness and give him a written opinion tomorrow or next week! The business man, too, has departmentalized his system, and put an expert at the head of each division. The president of a great company does not pretend to possess all the skills of all his subordinates. Of no other man is there expected today so wide a grasp and understanding, so broad a range of skill and learning, as is demanded of the lawyer. How far are we equipped, we lawyers, to meet the challenge! Are we ready to grasp the high opportunity opening before us? Let us in part cast up the balance sheet.

Great Spiritual Assets of the Bar

The answer in large part, I think, is a matter of the spirit—of the corporate soul of the Bar. And here we have two assets beyond price. We have the great mass of lawyers, rich and poor, in large communities and small, who do not compromise with the ideals of their profession, who earn their daily bread and with it the respect of their neighbors. Of them honor is so much a part that it would occur to no one that he need describe them as honorable men. Their uprightness is not news for the daily press, and only from their obituaries does the public come to know how gallantly they lived their lives. They constitute one asset, and not a little one.

Another is the great fund of enthusiasm and ideals which goes out into the Bar each year in the graduating classes of our law schools. We talk so much of moral qualifications for admission to the Bar. I do not minimize that vital need. But I do say with all the force that in me lies, that if the moral qualifications, the ideals, of the Bar as a whole were as high as those of each year's law graduates, we would have no problem of ethics at the Bar. It is important to find a way to exclude the comparatively few young men who at the time of admission are of bad moral character. But it is the far greater responsibility of us who are older to find a way to use and preserve the burning ideals of those young graduates and their fresh enthusiasm,—to re-light our torch from theirs which shines so bright. When we speak to them of morals and honor and uprightness, the challenge is to our sincerity. But I shall have more to say of this.

Another of our assets is the improvement in standards of legal education, in requirements for admission to the Bar. Here, we have gone far; but we have farther still to go. Day by day we are learning better how to train men in knowledge of the law, in capacity to think, in the qualities we love to believe should mark the lawyer as distinguished from the licensed legal mechanic.

Again, we can set down on the credit side of the ledger an almost incalculable amount of self-sacrificing work for the common good by Bar Examiners, by Character Committees, by Bar Associations and their officers.

Lawyers Furnish Their Share of Leadership

Again, we may fairly claim that lawyers are furnishing more than their share of effort and leadership in government, in politics, even in business, and that without their contribution the work could not have been well done or done perhaps at all. This is not an inclusive list of our assets; but before we close it we must not forget that since men first organized their interests in groups, and history began, civilization itself has moved forward along the broad pathway of the law. Men living together in society have always needed legal services and always will. It was Hobbes who said,

> "A herd of wolves is quieter and more at one than so many men, unless they all had one reason in them or had one power over them. . . . Hereby it is manifest that during the time men lived without a common power . . . they are in that condition which is called war; and such a war as is of every man against every man. . . . In such condition there is no place of industry . . . no arts, no letters, no society, and, which is worst of all, continued fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish and short."

Danger Signals of Distrust

Truly, we are advancing. But are we of the Bar keeping pace with what the world expects and needs from us—the world outside our cloisters? We should do well to face this question honestly, for the danger signals are flying.

There is wide distrust of lawyers, as a class, despite the great number of individual members of the Bar who are loved and trusted. Even in the Bible this was reflected, and it has come down through the ages, perhaps not increasing, but certainly not diminished by the situation in which we find ourselves today. Harold J. Laski feels that only putting lawyers at salaries on the public payroll can save the profession from a growing prostitution of its talents in the service of money, wherever money can be found. Disraeli bitterly described a lawyer as belonging to that profession which considers itself entitled to say anything, as long as it is paid for saying it.

Public Impatience with Legal Procedure

The public is with some justice impatient of the technicality, the delay, the white magic of legal procedure. It feels that too often a Court proceeding is a game of wits and not a search for justice. The public will never concede, of course, that what it means by justice is only that its own side of a case shall prevail; that what it wants is to win its case by whatever means; that the ethics of the lawyers who resist pres-

sure by their clients are far higher than the ethics of the public which employs them.

A further danger signal is the growing demand for non-legal or non-judicial agencies to perform functions which we used to think belonged to the lawyers and the judges. The spread of lay arbitration for the settlement of business disputes, the mushroom growth of administrative boards and tribunals testify to an increasing dissatisfaction with the processes of the law.

Competition for law business by collection agencies, banks and trust companies, insurance companies, real estate concerns and others, flourishes in part perhaps because they can advertise and the lawyer cannot; but in part, also, I think, because of dissatisfaction with the kind of service lawyers render, and the cost of it.

And the degradation in so many lands of Courts of justice into mere instrumentalites of an authoritarian state is a warning which in view of happenings in Washington last year, we might do well to heed.

Liabilities on Our Balance Sheet

When we come to enter the liabilities on our balance sheet, I do not know that we can claim that these danger signals, and others, are utterly without basis in reason. Let us see what some of those liabilities are. In the first place, we lawyers have been taught that to seek publicity for ourselves is in bad taste; and perhaps for that reason, as a group we have not known how to put our best foot forward, how to let the public understand our value to the community and the assets which we really possess. We have made no intelligent study of the uses of publicity to counteract an unfavorable press which headlines disbarments and investigations of ambulance-chasing. The public is allowed to take the honest lawyer for granted; when an unfaithful one is exposed, it is news. We have no conception of public relations for the Bar. I think we have never even attempted to educate the public to understand and press for high standards of the Bar; to teach it that a bad or dishonest lawyer can do more harm to the public than a bad plumber can, before he is stopped by the operation of the law of supply and demand; that in proportion to the responsibilities of the two callings, the requirements for admission to the Bar ought to be relatively as high as those for a license to be a plumber. And in but one place that I know of is any intelligent effort being made to educate the public as to why and when it needs the services of a lawyer.

But even at the best, none of us would claim that the Bar is in all respects what we would like to have it be. We must write in on the debit side some real shortcomings. We need not apologize, of course, because perfect justice under law has not yet been attained. As long as justice is administered by human hands, it will fall short of the ideal. But there are other liabilities with which we must charge ourselves.

Ideals Which the Young Lawyers Bring to the Bar

I spoke before of that fund of ideals which each graduating class brings into the Bar. Now, it has been said by a wise lawyer that the first wrong-doing of the average man is not inherent dishonesty, but failure to understand. And it is my experience that all boys who have graduated from our Law College—and I assume the same is true of others—think of their profession in terms of its ideals, of its patron saints. A boy in law school, dreaming of his future work, wants to be honored and respected and trusted. Not once since I have been teaching law have I been able to feel of a law student that he was aiming to be other than honest and decent. Law students, I believe, think of their future part in the work of the profession in terms of the leaders in state and nation of the Bench and Bar. True, they themselves may never perhaps be great lawyers; but as soon as they are admitted to practice, they will bear the same honored title as those men whom they have been taught to revere—they will be lawyers. I have not known one boy or girl who would not prefer to practice ethically, to help build up in the public mind trust and confidence in the profession. If the treasure of idealism put into our hands by but a few successive generations of law school graduates could be preserved whole and untarnished, that one achievement would revitalize the Bar.

Problems of Excluding the Unfit

Another entry on the debit side must be the fact that we are doing so little to exclude from admission to the Bar the few who are actually dishonest, and the others who lack the character to stand the test of temptation. This is no easy problem. Probably few young lawyers coming to the Bar are inherently dishonest; but how many these are, we do not know. How many become unethical because they or their families are hard pressed to live, how many simply because the law appears to them, as it was phrased a few years ago by a young applicant before a character committee, like "easy jack," we cannot tell. Nor if we face the facts can we be sure how many of us who have decent incomes would be tempted beyond our strength if our children needed shoes or their lives depended on expensive medical treatment or on a trip to Florida. "There, but for the Grace of God, goes Philip Sidney."

Our character committees, examining students as they mostly do, after the boys have spent three years of time and money in law school, have often come to feel, being human, that the boy has acquired equities by his time and money spent, and that only cogent reasons should cause his rejection. Usually, too, these committees are crippled from the start for lack of facilities to investigate the applicants. The requirement of affidavits as to good moral character is notoriously futile. As a result, only about two per cent of all applicants are rejected, and the character committees themselves are the first to say that they cannot under the present system weed out the unfit. Of course, the value of their devoted and self-sacrificing work must be measured not by these facts alone, but by what might be called the *in terrorem* effect which they have in discouraging considerable numbers of the obviously unfit from ever studying law. A conviction for burglary or murder does not necessarily mean that the convict lacked the mere intellectual ability to go through law school and pass the Bar Examination.

The Bar Has Not Faced Its Responsibilty for Exclusion

But here again, the Bar has not faced its responsibilities. In Pennsylvania, to be sure, a long step forward has been taken. Pennsylvania starts with a concept which apparently in most States is frowned on as undemocratic, as it was until 1935 in Indiana,—the concept that no man, simply because he is a citizen, has the inherent right, even though his background, training and qualifications may only approach a minimum of adequacy, to study law and inflict himself upon an unsuspecting community as qualified to protect the vital legal interests of his clients.

In Pennsylvania, too, the applicant is investigated

before he enters law school, and remains under close supervision until finally admitted to the Bar. In this presence, I need not review the details of the system. But in practically all the other States, no progress whatever has been made since the beginnings of the Bar, in achieving a test of character which really exerts any effective selection.

Discipline and Disapproval of Unethical Practices

Furthermore, we have failed to put our house in order by way of discipline and disapproval of unethical practices, except in the grosser instances. We are a public profession, depending for our income on employment by the public. But the public, watching us, comes sometimes to feel, as the younger lawyers do, that we are not truly interested in the ethics that we preach. The comparatively few dishonest lawyers pre-empt an undue proportion of all the publicity accorded to the Bar. We do not even supervise the young lawyer during his first few formative years of practice. If he was appointed, on admission, for a term of five years, at the end of which he must bring before an adequately implemented committee a detailed account of his work to date, the young lawyer would feel, I think, that he was being given a powerful weapon to help him in his destire to play the game honorably.

If I am right, and it is the influence of a few older lawyers which corrupts the young man, then the knowledge that after five years he must prove himself free from serious blame would strengthen his resistance to that influence. Law offices known to be unethical would find difficulty in getting clerks to serve them. After a few years of such a system, its influence for good might be very wide. But we have not tried it, nor anything approaching it. In the face even of the avalanche of applicants for admission, we go on as before.

The Trends to Specialization Do Not Aid the Average Client

There is another debit entry to be made. I have spoken of the vast and evergrowing complexity and number of problems which lawyers must face, the broadening fields of work which call for their help and leadership. To meet a corresponding challenge, our brothers the doctors have specialized. And in the large law offices in the greater cites, specialization likewise has taken place. The wealthy and well-to-do, the good-sized and huge corporations can find in such offices experts already trained in their particular problem, and in those offices can get help and protection promptly and at a cost having a reasonable relation to the value of the service.

But the small business man, the man of moderate or small means, is not in such a good position. Even if he happened to know the name of a lawyer, he does not know if he is honest or competent nor if he is expert in the client's particular problem. He is afraid of lawyers, anyway. He has heard that they will not fix a charge in advance, and are likely to take everything that the client gets by way of recovery or to charge more than the client thinks the service is worth.

Oftentimes the little man does not even know when he needs a lawyer's services. But his local trust company, perhaps, will draw his will for nothing if he makes it his executor. The real estate office, down on Main Street, makes no charge for filling out the blanks in a printed form of deed or lease. The collection agency for a small percentage will collect the money due him. From these agencies, and others, he gets expert service promptly done at reasonable cost. And when he gets hurt in an automobile accident, he wants the same kind of service and hires the first ambulance-chaser who shows him a sheaf of photostated checks recovered in previous successful cases. The little man thinks he will get the same expert service here too, and sometimes, it must be confessed, he does. Putting aside for the moment any question of unlawful practice of the law, of ethics and morals of the profession, the little man, the general public, is patronizing these competing agencies in part perhaps because they can advertise, and the organized Bar makes no attempt to acquaint the public with the value of the services it can render; and in part because of the demand for a kind of service which, the public thinks, it can get from these agencies better than it can at the hands of lawyers.

We condemn ambulance-chasing. Sometimes we investigate it. But for lack of something better the public continues to support the ambulance-chaser. And that "something better," the Bar as an organized body makes no attempt whatever to supply. It does not so organize itself that it can compete with the trust company, the real estate firm, the collection agency, for the good will and the business of the public. What the public demands is service, expertly and promptly done, at reasonable cost. And what the public demands, in the long run it will get. It demanded a more just and more scientific approach than the Bar could or would give it, to the problem of employees injured in factories; and it got the workmen's compensation law. If the little man thinks he gets better service or service at lower cost from other agencies than he does from the Bar, he will continue to support those agencies. And he will not be too sympathetic when he hears how law business and the incomes of lawyers have been cut down.

The Bar Must Meet the Facts Head On

The efforts of the Bar to stop ambulance-chasing and the unlawful practice of law, are not to be belittled. But I think they will never succeed until we meet the facts head on, and realize that we must do two things; first make the public understand the need and value of legal services and the trustworthiness of the great mass of lawyers; second, so organize the Bar that it can go out into the market place and compete successfully in supplying the public with the services it needs and demands and will have. No amount of investigation will frighten the public away from the ambulance-chaser if it believes him to be the man who gives it a service that it greatly needs. You cannot legislate the public away from what it needs and wants. The public will take its law business to lawyers if it gets better service. But ultimately, legislation or no legislation, it will get that better service somewhere. We have been relying for the continuance of our law business upon a state-protected monopoly. And unless we organize ourselves to render the kind of service the public is entitled to, the public will not support that monopoly forever.

Perhaps there is nothing to be done. Perhaps other parts and kinds of law business will be taken away from us as happened in the case of injuries in factories. Perhaps automobile cases, despite the objections to such a system, will ultimately be turned over to a commission; and administrative boards and bureaus and arbitration tribunals, and other agencies such as those I have named above, will progressively

cut into the business we have known as practicing law. Unless the organized Bar is willing to compete with these other agencies and bodies for the public good will—is willing to take the responsibility of giving the service the public needs, then in truth I believe our business more and more will fall to others.

Civilization Depends on Respect for Law

The task is formidable, perhaps, but certainly not hopeless. We know that in the Bar we have intelligence, generous devotion, high-mindedness and a great tradition. The strong tide running against us cannot be turned over-night. I have tried to outline in this paper some at least of the approaches to our problem, some of the realities which I think we must face, some of the questions on which we must put our minds and the best intelligence we have. All of us share the responsibility: the Bar Associations and Character Committees, the Bar Examiners, the schools. All of us together, we are a great partnership with a task and an opportunity of no little importance to the good of the world. That which holds the community together and makes civilization possible at all, is not perhaps so much laws or bodies of law, as respect for law. It is not so vital what the law is, as that it should be honored. On the honor which is accorded to law is built the unity which we call civilization.

The march of civilization goes forward along the roadway of respect for law. The wiser the laws, the smoother the road of course will be, and the swifter the march. Swift or slow, however, civilization will move as long as the road is there at all; as long as there is any substantial respect for law. But destroy respect for law and you destroy law itself and civilization with it.

Law exists only in its own observance. To be honored, is its breath of life. For a single statute and for the great institutions of man-made law, to be dishonored, to lose respect, is death itself. Any law or any body of laws which does not command, which to any marked degree fails to command the respect of the community, falls short to that degree of deserving the name of the law. But it does more. It is a direct attack on that respect for law without which civilization must fall to pieces. And it depends upon the servants of the law how much their mistress will be honored and obeyed.

The part of law, then—law honored and respected and alive—is the high function of happiness and peace, of security and honor, of good faith and justice toward which mankind will ever strive. It is the path which guides the world toward the ever-nearer, ever-receding goal; the goal which was vaguely the hope of men in the dim days before history began; the goal that humanity has envisioned as peace on earth, good will to men.

I spoke at the beginning of patron saints. Gentlemen, may I venture to dedicate this speech to two men of whom I have been thinking as I gave it. However inadequate the draftmanship, its subject matter was close to their hearts. They lived, as not many men have done, great lawyers and great gentlemen. One could not but be proud to share with them the honored title of lawyer. They loved their profession; their faith in it and in its high traditions meant to some of us our deepest inspiration. Honor and devotion enveloped them like the air they breathed. The steel was there, beneath the velvet glove; but the velvet was deep, and the hand was always gentle. The two were dearest friends. One of them I shall not name. The memory of the other is piled deep with the fresh laurels of a grateful Nation. But the unassuming kindliness of Justice Cardozo would not, I know, think it presumptuous if, in a cause he so deeply loved, one more small spray were added.

ANNOUNCEMENT OF 1939 ESSAY CONTEST CONDUCTED BY AMERICAN BAR ASSOCIATION PURSUANT TO TERMS OF BEQUEST OF JUDGE ERSKINE M. ROSS, DECEASED

INFORMATION FOR CONTESTANTS

Subject to be discussed:

"To What Extent Should Decisions of Administrative Bodies Be Reviewable by the Courts"

Time when essay must be submitted:

On or before March 1, 1939.

Amount of Prize:

Three Thousand Dollars.

Eligibility:

Contest will be open to all members of the Association in good standing, except previous winners, members of the Board of Governors, officers, and employees of the Association.

No essay will be accepted unless prepared for this contest and not previously published. Each entryman will be required to assign to the Association all right, title and interest in the essay submitted and the copyright thereof.

An essay shall be restricted to six thousand words, including quoted matter and citations in the text. Footnotes or notes following the essay will not be included in the computation of the number of words, but excessive documentation in notes may be penalized by the judges of the contest. Clearness and brevity of expression and the absence of iteration or undue prolixity will be taken into favorable consideration.

Anyone wishing to enter the contest shall communicate promptly with Executive Secretary, American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, who will furnish further information and instructions.

New York Character Committee Adopts Recommended Standards

At a meeting of the Committee on Character and Fitness for the Second Judicial District of the State of New York on October 7, a motion was adopted "approving in principle the entire program of standards adopted by the joint meeting of the National Conference of Bar Examiners and the Legal Education Section of the American Bar Association." These recommendations favored, among other things, registration and examination of applicants at the beginning of law study, power in the character and fitness committees to administer oaths and subpoena witnesses, administrative machinery for the investigation of applicants where further information is needed, an investigation of applicants for admission on foreign license by the National Conference and more attention in general to the problem of character investigation.

THE LAWYER AND HIS STATE BAR ASSOCIATION

Ideal State Bar Association is Composed of Affiliated Locals Including Every Lawyer—Duty to Support High Standards of Admission—Can Be Helpful to Young Lawyer in Setting Up His Office and in Solving Problems of Every Day Practice—How Two State Associations Reduced Cost of State Statutes—Listing Lawyers According to Their Specialties—Election By Mail Ballot Has Met Criticism of "Clique" Domination — Organization of Sections Has Brought Wide Participation in Association Work—Women's Auxiliaries Formed In Illinois—Key to State Bar Association Success Lies in Wide Diversification of Activities*

By R. Allan Stephens

Chairman of the Section on Bar Organization Activities of the American Bar Association, and Secretary of the Illinois State Bar Association.

STATE bar associations are, at present time, by no means uniform in their characteristics. Their organizations fall generally into three classes—the old voluntary bar associations, those incorporated by an act of the legislature requiring every practicing attorney to belong, and the recent class of those organized by rules of the Supreme Court of their respective states. The difference in these three classes, however, is only one of requirements for admission to membership.

After a lawyer has once passed the inner guards and become one with the organization, so far as his relations with its activities are concerned, there is no difference between the three types of associations. You recall the saying about the horse—that you can lead him to water but you cannot make him drink, and lawyers are the same with their bar associations. By acts of legislature or decrees of court you can require lawyers to belong to bar associations, but if they are not interested in organized bar activities or benefited by their efforts, you are simply adding an additional tax to an already overtaxed profession when you say that they must belong and pay dues.

Ideal State Bar Association

To my mind the ideal state bar association organization is one which is composed of local bar associations, with every lawyer in a county or city belonging to his local, district, or some city bar association, and each one of these locals affiliated with the state association through proper delegates. Such a state organization will enlist the active support of the largest number of lawyers and be one which can well justify its existence in comparison with any other professional group. In my own state we have been striving for this form of organization for years and hope some day to attain it.

The success of a state bar association, however, depends not so much upon its form or organization as its relationship with the men in the law offices. If the lawyer can be made conscious of the fact that he is as much a member of the state organization as he is his local association and that he is getting out of the state organization as much if not more than he puts into it in time or money, that association is a success.

If, on the other hand, he belongs merely for the reason, given by a prominent member of a well-known state bar association—"Oh, after you're dead it's a good thing to have the local newspaper say that you were a member of your state bar association"—if that or an equally foolish statement gives the only reason why he belongs, then the state association is a failure.

Bar Associations in Law Colleges

It is being generally recognized by the officials of these organizations that the sooner contact is made with the embryo lawyer, the better, and so some state bar associations have affiliated student bar associations in the law colleges. One state association charges the law student a dollar a year dues, gives him the state bar association journal and all literature published by it, and even goes so far as to return to his student association one-half of his dues to carry on its own work. It is surprising what bar association activities these student groups develop.

When the students are admitted to the bar, several of the state bar associations sponsor admission ceremonies and tender a luncheon to the lawyers at which time they are greeted by the organized bar of the state and made to feel that they are indeed one of the profession. In reply to an inquiry as to whether it did not cost too much to give these luncheons, the secretary of one of these associations replied that it never cost them anything for enough of the new lawyers joined the association that day to pay all the expenses of the luncheon.

Responsibility for High Admission Standards

In the matter of requirements for admission to the bar, it should always be the duty of the state bar association to see that the educational requirements for bar admission measure up to the highest possible standards consistent with local conditions. The day has gone when competition in the legal world is localized by county or state lines. With the coming of the hard road and the automobile, the

*An address delivered at the annual meeting of the Missouri State Bar Association at St. Louis, on Sept. 30, 1938.

lawyer in the smallest county seat must compete in legal business of importance with the lawyer of the city.

It is obviously unfair to admit a young man to practice without sufficient legal education to enable him to meet this competition. We are not treating him fairly when we allow him to come to the bar as an underprivileged member of the profession in so far as his educational equipment is concerned.

If the new lawyer is fortunate enough to have a place all ready for him in some large office, the next step in his bar association life may be unnecessary, but the young man who is starting out by himself, will need information as to the practical side of the practice of the law.

At this time in the young man's career as a lawyer the state bar association has a wonderful opportunity. For example, he wants to know what he should charge for fees, and the state association can furnish him with this information, not any fixed schedule which every member of the bar has agreed to live up to like a labor union rate, but the consensus of opinion of its members on what they consider to be the minimum fee which should be charged for different types of services. Several state bar associations now do this.

Helpful in Setting Up Office

The state bar association can also furnish the young lawyer with information as to how to set up his office. As a feature of the recent meeting of one of our state associations, an office furnishing company was induced to set up a model law office with the latest gadgets for efficient service. A consulting architect, who had considerable experience in designing law offices, gave an address upon the latest features in law office equipment. This address was printed and made available for the members of that state association.

One of the easiest things for the state bar association to do, and at the same time a most valuable aid to young lawyers, and many older lawyers, is to prepare a scrapbook containing the blank forms used by the leading law offices in the state. One state association has six duplicates of such scrapbooks and it needs every one of them for there is always a waiting list of members of the association who want to borrow it for a week or ten days to see how the other fellow sets up his office.

Most young lawyers worry about what books they should buy for the library. The experiences of old members in the state bar associations can be at their disposal in the shape of suggestions for libraries. One such suggestion groups such libraries along the line of cost as, for example, the best working library of law books which might be bought by young lawyers for $200, for $500, for $1,000.

Service of Primary Importance

Now our young lawyer is settled in his practice. It may be by himself, or he may be getting to a point in a large office where he has some responsibility for carrying the overhead expense. If the state bar association is going to enter into his life, it must do so, not by telling him what a great organization it is, but by that simple word "service."

The greatest need of the young lawyer is practical help in his every day practice problems. A case comes to him in a field which he had never heard of before. If the state association has on file in its office lists of elder lawyers who have specialized in this particular field, with their consultation charges for fellow members of the bar, the young fellow who has, for the first time, a problem in future interests, for example, can, for a moderate consideration consult with some older lawyer who has worked with such problems for years. In thirty minutes that older lawyer can give him more practical information concerning his problem than he can get in months of personal investigation.

This service in one state bar association now lists over 200 of the leading members of its bar and is being used increasingly for consultation not only by younger members but older members who are suddenly thrown into fields with which they are not familiar.

Reduced Cost of State Statutes

Recently, two state bar associations have found that the members of their bar were paying too much for the state statutes. As a result of their consideration of this one subject and negotiations with the publishers, members of one association are now saving $15 and of the other, $11 on each purchase. One of these state organizations is going a step further next year and there the new statutes will be purchased at the reduced price only through the state bar association. Others will pay possibly $5 or $6 more.

Many of the leading state bar associations now have an office in the city where the state capitol is located. No two of these offices are the same in methods of operation or scope of activities. In one an executive secretary is paid a salary of $5,000 a year. In other states the executive officers include the librarian of the Supreme Court, a stenographer in the attorney general's office, the clerk of the Supreme Court, and a young lawyer who devotes part time to handling the affairs of members of his association in and about the capitol. This last representative takes care of the wants of his members at a cost to the association of only $50 a month, most of which comes back in services paid for by its members. One state association spends approximately $10,000 a year on its state capitol office which has three full-time and one part-time employe.

Another association finds it profitable to keep a contact man out visiting its members all the time. He has taken the place of the old committee on new members, which usually held several meetings during the year with lunches paid by the association and ended up the year with an average of two or three new members for each member of the committee. Today the contact man turns in four or five times as many new members as the old committee did and in addition is invaluable to the association in calling on those who have become delinquent in their account. He listens to the story of their reasons and in most cases brings back to the enthusiastic support of the association and its activities a member who was slipping and soon would have become a bitter critic of the association.

Law Library Established in Hotel

Many a member who never attends an annual meeting and feels that he is unable to engage actively in its work is nevertheless glad to be a member of an organization which thus serves him in his daily needs.

The Ohio State Bar Association has gone so far as to establish a library in a leading hotel in Co-

lumbus for the use of its members who may want to use books after library hours. This is a service which is greatly appreciated and is frequently used by lawyers needing these tools of their profession when they arrive at the hotel.

A field in which I believe the greatest progress is now being made for the benefit of the practicing attorney consists of surveys and studies of the economic condition of members of the bar. To those of you who are interested in this subject I urge the perusal of the recent report of the American Bar Association Committee on Economic Condition of the Bar, drafted by Dean Garrison of the University of Wisconsin.

A study of that report clearly indicates that the amount of business transacted by lawyers in the United States is insignificant compared with the amount of legal business which is going to waste all around our law offices because prospective clients do not know to whom to go for a solution of their legal problems, or fear to enter a lawyer's office because of uncertainty as to the amount of our fees.

As I have heretofore indicated, we have maintained a consulting service for some years past, and although we have not advertised it outside of our membership, information has gradually seeped through to the public. The result is that there is rarely a time when we do not have calls for lawyers in fields in which we cannot supply the demand. For example, only last week a Chicago lawyer sent us a client who wanted to consult with an attorney who was qualified to advise on the Frazier-Lemke act. Another wanted us to indicate a downstate lawyer whose opinion would be accepted by banks upon the validity of drainage district bonds, while the latest puzzle is that of trying to find a lawyer who has had experience in literary plagiarism cases. As I dictated this, a letter from a prominent Chicago firm was laid on my desk in which they asked for the name of some Illinois lawyer familiar with custom law.

The New York State Bar Association took the first practical step to solve this problem in publishing a registry which lists its members, and, wherever the member is willing, gives information, as to legal education and the fields of law in which he specializes. The Michigan State Bar Association has recently published a similar list. Our association has been working on such a list for some years past, principally in building up a demand for it among our members and studying the matter of classification and terminology, so that the information would be of practical use to the profession and the public. We feel that we are now ready to make our contribution to the solution of the problem by publishing our classified membership list.

Illinois Bar to Have Classified List

At the present time we propose to publish a list which will begin by defining what we consider to be "general practice of the law" in terms of the specific fields of law. This will include about thirty different fields, and when the member indicates that he is a general practitioner, it will mean that he is qualified in any of these common competitive fields.

Beyond a general practice designation we propose to allow a member who has had experience in other fields to indicate such fact, not classifying himself, however, in more than five fields. To be classed as experienced in these fields we require that he has had at least three experiences and that a memorandum of the cases or experiences be filed with the association. He may then indicate that he is a general practitioner and experienced, for example, in drainage, mining, corporation and banking law or those particular fields in which he has had occasion to venture. If the member devotes one-half of his time to any particular field he may call himself a specialist.

We have had many calls for services of lawyers in neighboring states, and last year our board of governors established an associate membership which is open to members of the American Bar Association residing outside of the state of Illinois. This membership carries with it all the privileges of a resident membership and is being availed of increasingly by lawyers who have business to attend to in Illinois.

Hope to Have American Bar Law List

Recently Herbert Harley carried a short paragraph about it in the American Judicature Society Journal which indicated that the names of the associate memberships with their classifications would be carried in the membership list. Since then we have had a number of inquiries from lawyers in New York, Washington, Indiana and one came from Colorado, which indicated that the American Judicature Society Journal is being read throughout the country.

The Los Angeles County Bar Association has taken this matter up as a local problem, and in the event you have legal business in Los Angeles and will indicate to its secretary the nature of your case, he will give you the names of three Los Angeles attorneys who are qualified in that particular field.

I understand that several other city bar associations are studying the same problem, and many of us hope that we will see the day when the American Bar Association will publish a list somewhat similar to that of the American Medical Association which gives information as to every physician in America, and if engaged in any one of twenty-five specialties, that fact is so indicated.

Associations Have Pension Funds

George Ade once wrote in one of his fables that the ordinary country law practice was a stepping stone to ownership of the finest farm in the country, and while this is true in many instances, we not infrequently meet lawyers who have lived honorable lives, but through misfortune approach old age only to face the horror of lack of a competency.

Several state bar associations now have pension funds. One with which I am familiar has accumulated a considerable sum by voluntary gifts, which sum is used from time to time to relieve the necessities of some unfortunate members. Recently, two members whose offices were wiped out by the floods were thus given aid, while three other members have been placed in old folks homes, and another contribution financed medical treatment for the invalid son of a deceased member. During the past year that fund has been augmented by the bequest of one of its members under which the association will receive approximately $30,000 to be used for these purposes.

The activities which I have detailed so far have been those which came from services rendered by the state bar association to its members. Any private individual could probably render these services

to the lawyers without their participation therein, further than paying for the services. A successful state bar association, however, is one which gives full opportunity to all of its members to participate in its activities. This participation should be one that will make each member feel that he is a part of the organization and carries a responsibility for its work.

Complaints Against Association

It is quite customary to hear members of state bar associations, whether they are formed as voluntary associations or are integrated bars, making complaint that their association is run by a "gang" or "clique" and unless you are "in on the cut," you have no part in the association.

This feeling is quite natural when the officers are selected by a nominating committee, appointed by the president, which reports the annual meeting when but few are present, and under circumstances where it would be a brave man indeed who would offer an opposition ticket. Had the complaining member authority to select the nominating committe, he would probably have selected the same type of a committee and the same nominations would have been made. The mere fact, however, that he did not have anything to do with the appointment of the committee, or the resulting nominations, makes him feel that he does not have anything to say in the organization.

Years ago, we changed this in our association, and since then all nominations and elections are by mail. Any member who would like to be an officer can file his nomination petition, if he can get twenty members to sign it. Thirty days prior to the annual meeting, a ballot is sent out by mail. The members thus vote in their offices and mail their ballots in to the tellers.

Method of Elections Successful

When this method of election was first proposed, it was predicted that the standard of the officers would be lowered, that blocs of lawyers would be formed and thus put in men who were not qualified for their positions. The very opposite has happened. To be elected to office, the man must be one who is well known to the bar of the state, and little attention is paid to his sponsors.

Of all the recent developments in the modus operandi of state bar associations for the purpose of encouraging the interests and activities of its members, the most important has been the recent trend changing the participation of members from committee to section activities.

Section System of Organization

In several state bar associations it has been recognized that the organization is small enough geographically so that the matter of holding the meetings of members of a section is not as difficult as it is in the American Bar Association, and the movement of changing committees into sections wherever possible is now progressing rapidly. One state association is operating fourteen different sections, such as criminal law, state civil practice, real property, taxation, corporation, banking and municipal law, professional relations, public relations, and other sections. Nine of its sections are the same as those of the American Bar Association. These sections are officered by a chairman, a vice chairman, and a secretary, who together with four members, selected by the president of the association form the executive committee of the section.

One of the interesting developments of the section system of organization for a state bar association has been in the matter of legislation. Under the old committee system, when the association proposed a bill, a committee of three or four members would attend the legislature and urge that it be passed because the state association favored it.

Under the section system, this method of procedure is all changed. The criminal, insurance, corporation, probate and banking codes, and the amendments to the Practice Act are drafted by the very best legal minds in the state in these particular fields of law. When the bills are presented to the legislature and their passage urged, it is not because the association demands that the legislation be enacted, but because these bills represent the best thought of the best legal talent in the state on that subject.

Members Participate

Lawyer members of the section throughout the state have participated in the drafting and are interested in their passage, and when the bills appear before the legislative committtee, there are usually members from different parts of the state in attendance, not only to explain the features of the proposed legislation, but also to give their personal approval to the member of the legislature from their district.

Above all, the section system has done away entirely with the old criticism that the state bar association is run by a few lawyers. Under this system, any member has an opportunity to meet with other members practicing in his chosen field and help shape the policies of the association on matters peculiar to his branch of the law.

The method of checking on the actions of sections, usually followed by a state bar association, is that a section may take any action it desires provided that, before action becomes final, it must be approved, in writing, by a majority of the members of the council of the section and submitted to the president of the association for his approval.

The president may defer his approval until after consideration by the governing board of the association, if he desires. Experience has shown, however, that nine-tenths of the actions taken by sections do not require consideration by the governing board of the state association.

Board of Governors Has Supervision

In order that there may be a close coordination between the sections and the governing body, members of the board of governors are assigned to sections and required to attend all of their meetings. In this way, the governing board has at all times an eye-and-ear witness report through one of its own members of the actions of the section.

In state organizations it is becoming common to elect two or three vice presidents, and the third one with the understanding that he will advance through the successive offices until three years thereafter he will reach the top.

Members of the governing board are assigned to the supervision over committees and sections, and each vice president is placed in charge of one-third of the members of the board and the groups supervised by them, so that by the time he reaches the

office of president, he has had the actual supervision of every committee and section in the organization.

In one association, the first vice president even receives a report each month of everything done in the executive office and is charged with supervision of its actions.

The latest development in Illinois is a state association for lawyers' wives, and relatives. It has been running less than a year and already has over 500 members. The state organization is officered by the wives of the officers of the State Bar Association and in each of the seven districts of the state where there are federations of local bar associations, Women's Auxiliaries have been set up for the district. To these district organizations are affiliated local associations paralleling local bar associations, and by the end of the year, if the present rate of organization continues, there will be Ladies Auxiliaries in most of the counties of the state.

In my more than a quarter of a century experience in bar association activities, I have observed that the more successful State Bar Associations are those which have the largest variety of activities. During the past year two men who never partcipiated in the State Bar Association's activities sent in their checks for $100 each for the pension fund and that act of giving indicated just as much interest in the association as the man who attends the annual meeting to compete in the golf contest. The monthly magazine reaches many Opportunities to participate in the work of some section, or even the gratitude of a lawyer, father of an applicant, who was entertained by the association on the day of his admission to the bar; these and many other different varieties of activities are the things which make for the success of the state association.

WILLIAM ROY VALLANCE
Chairman, Section of International and Comparative Law

JACOB M. LASHLY
Chairman, Section of Commercial Law

The New Section of Commercial Law

The officers and council of the Section of Commercial Law, which was organized at the Cleveland meeting, have tentatively agreed upon the creation of committees to deal with the subjects of Bankruptcy and Liquidation; Reorganizations; Cooperation with ABA Committees on Ethics and Grievances, Unlawful Practice, Securities and Exchange Laws; and Cooperation with other Organizations, as a beginning of the work the Section will engage in.

A letter addressed by the Chairman of the Section, Mr. Jacob M. Lashly, of St. Louis, to those members of the American Bar Association thought to be interested in the Section, invites application for enrollment in the Section, so that from such enrollment choices may be made for services in Committee work. The letter states that "there is reason to believe that the evolutionary movements of these changing times will furnish an unusual opportunity for the preparation of a program of great interest and merit for the benefit of lawyers engaged more or less in commercial practice and for the public at large."

Annual dues in the new Section are $2.00, and members of the Association may make application for enrollment and send remittance for dues to the headquarters of the Association, 1140 N. Dearborn St., Chicago, Ill.

COLLECTIVE BARGAINING IN SWEDEN

By Prof. James J. Robbins *of Tulane University and*
Dr. Gunnar Heckscher *of the University of Uppsala, Sweden*

SWEDEN'S experience in the law of collective bargaining offers a promising field of study for Americans who desire a form of industrial peace which does not extinguish freedom of association. The rising demand for some kind of social "discipline" for labor unions which have recently gained such great power, prompts the question whether such discipline and freedom of association are compatible.

In some respects, there are remarkable parallels between Swedish and American laws on labor unionism. Chief Justice Hughes remarked in the *Jones & Laughlin* case[1] that "the right of employees to self-organization and to select representatives of their own choosing for collective bargaining" is a "fundamental right" which Congress might properly safeguard in its exercise of the commerce power. Congress has declared its intention to do so in a number of recent statutes.[2] Five States have adopted similar laws.[3] The Swedish text of the Law Concerning the Right of Association and Bargaining of 1936 holds that "the right of association shall be inviolable."[4]

Behind the statutory provisions in Sweden, however, there stands a unique historical development. The Swedish statute of 1936 is the latest of a series of acts beginning in 1906, which have not, in general, introduced any radical novelties. They have been rather a codification of existing practice already embodied in innumerable collective contracts over an extended period. Labor unions in Sweden arose in the eighties, achieved great success even in the nineteenth century, and, despite a serious set-back following the failure of the general strike of 1909, have now become an essential element in the economic organization of the nation. To balance their power employers' associations have likewise grown up, so that for three decades the two main factors in industrial relations have been firmly established and their right to exercise power has been unquestioned. Both are highly centralized, with governing organs which have been perfected by experience.[5]

Industrial strife has taught both employers and employees the necessity of permanent associations and the value of collective action. Consequently, in order to reduce the burdens of protracted hostilities, the practice grew up of concluding collective agreements, earlier running for four years but more recently for one or two. At first, the government acted only through the traditional machinery of administration and the common law. In 1906 its good offices were proffered in industrial disputes through mediators who still had no coercive power over the parties. Attempts on the part of the Conservative government (1906-1911) to get a statutory definition of societies in general were unsuccessful. Meanwhile, the collective agreements which followed these struggles were continually providing the practical foundation for later legislation. Invariably such agreements stipulated the right of workers to organize, while almost invariably reserving to the employer the right to "lead and distribute" the work (*leda och fördela arbetet*), as well as maintaining an open shop to unorganized labor without prejudice to union men.[6] Until 1928 there was no statutory limitation upon the use of strikes and lock-outs.

Long experience with these collective agreements, resulting from the peculiarly effective organization of associations for both adversaries, provides the basis for the three important statutes of the past ten years. The first of these, the "Act respecting collective contracts"[7] was adopted in 1928. It makes a contract binding upon the parties, who are liable for damages in case of infringement whether they are individuals or associations. The field of permissible struggle was narrowed by making illegal all strikes, lock-outs, blockades and boycotts or other hostile action of like nature used to effect changes in the terms of a contract during its term.[8] These weapons, however, were not disallowed for other purposes.

1. *National Labor Relations Board vs. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 33 (1937).

2. See *Norris-La Guardia Act* (Mar. 23, 1932, c. 90, sec. 2, 47 *Stat.* 70; 29 U. S. C. A. 102); *Railway Labor Act* (May 20, 1926, 44 *Stat.* 577, as amended in 1934, 48 *Stat.* 926, 1185; and in 1936, 49 *Stat.* 1189; 45 U. S. C. 151-188); *National Labor Relations Act* (July 5, 1935, c. 372, sec. 1, 49 *Stat.* 449; 29 U. S. C. A. 151); *Merchant Marine Act* (June 29, 1936, c. 858, Tit. III, sec. 301, 49 *Stat.* 1192, as amended by Pub. No. 705, 75th Cong., sec. 1001); *Guffey-Vinson Coal Act* of 1937 (Ap. 26, 1937, Pub. No. 48, 75th Cong., sec. 9).

3. Mass. *Acts*, 1938, c. 150 A, sec. 1; N. Y. *Laws*, 1937, c. 443, art. 20, sec. 700; Pa. *Laws*, 1937, Act No. 294, sec. 2; Utah *Laws*, 1937, c. 55, sec. 2; Wisc. *Laws*, 1937, c. 51.

4. *Lag om förenings—och förhandlingsrätt, 11 sept. 1936. (Svensk Författningssamling, 1936, Nr 506)*, Art. 3. See Report of the President's Commission on Industrial Relations in Sweden, *New York Times*, Sept. 25, 1938. The English text of these laws can be obtained from the Secretary of Labor in Washington, D. C.

5. The Swedish National Federation of Trade Unions (*Landsorganisationen i Sverige*) was established in 1898. Today it includes 42 union federations, craft and industrial, comprising some 850,000 workers. Opposing it is the Swedish Employers' Association (*Svenska Arbetsgivarföreningen*), established in 1902, which now has a membership of 5,000 employers who employ about 400,000 workers. Compare Jos. Meade, "Industrial Relations in Sweden," *Economic Forum*, Oct. 1937, pp. 45-51.

6. See the reference to this clause in Mead, *op. cit.*, p. 50. As to the earlier history of the Swedish labor movement, see G. D. H. Cole, *The World of Labor* (London, 1919), pp. 182-190.

7. *Lag om kollektivavtal, 22 jun. 1928 (Sveensk Författningssamling, 1928, Nr 253, s. 601)*. English translation in International Labor Office, *Legislative Series*, Vol. IX (1928), pt. 2, p. 1536.

8. *Ibid.*, Art. 4: "Employers or employees who are bound by a collective contract shall not, during the period of the validity of the contract, take part in a stoppage of work (lock-out or strike), blockade [which includes picketing], boycott, or other hostile action of a similar nature:

1. On account of a dispute respecting the validity, existence or correct interpretation of the contract, or an account of a dispute as to whether a particular act constitutes an infringement of the contract or the the provisions of this Act;
2. in order to bring about an alteration in the contract;
3. in order to enforce a provision which is to come into operation on the expiration of the contract;
4. in order to assist others in cases in which the latter cannot themselves commit hostile actions.

If an association or a member of an association is bound

The second statute,[9] enacted at the same time, established a Labor Court to adjudicate questions arising under the law of collective contracts. There are no preliminary hearings by an administrative body as, for example, under our National Labor Relations Act. It is a court of first instance, and its decisions are final. The established importance of the voluntary associations which had already grown up on the sides both of employers and employees is evident in the personnel of this Court. Four of its seven members are appointed for two-year terms upon recommendation of these organizations, two from a list presented by the Swedish Employers' Association and two from the list of the Swedish National Federation of Trade Unions.[10] The other three are neutral, and of these, two—the Chairman and Vice-Chairman—must have had experience as judges. The unions were at first distrustful of the Court, but the able leadership of its first Chairman, Arthur Lindhagen, has now raised the tribunal to an estimable position. It appears to be firmly established in Swedish jurisprudence.

The third and most recent statute,[11] adopted in 1936, crystallizes into law the growing demands of all sides that the right of bargaining for one party include the duty of the other to take part in a conference. The minutes of this conference become an important basis for settlements and for the interpretation of agreements. While the legal text of the statute is noncommittal, the political history of this law evidences the purpose of its proponents to extend to the "white-collar" classes those principles of collective bargaining which had already become established in practice as well as in law for craft and industrial unions. Reaching back into the earlier stages of employer-employee relations antecedent to the collective agreement itself, and the disputes arising thereunder, the act of 1936 aims to reach all classes of workers in general, whereas the laws of 1928 had simply thrown the protective cloak of statutory provisions about collective agreements already reached among workers successfully organized.

Thus the 1936 statute, while based on experience, greatly widens the scope of collective bargaining, both as to the number of employees involved, and the inclusiveness of the bargaining process.[12] It not only renders inviolable collective agreements made, but creates an obligation to participate in the process of collective bargaining. Section one extends the law to the relations between all employers and employees, excepting only employees of the state. No labor contract which violates the right of association is enforceable.[13] One party may demand a conference with the other, although the latter may require that the demand be in writing, specifying therein the questions to be discussed. A time and place of meeting must be agreed upon without delay, and minutes of the proceedings may be recorded upon demand of either party.[14]

This brief resumé of the Swedish law shows how voluntary associations of employers and employees have gradually assumed important public functions without relinquishing the principles of competition and freedom of association. Industrial peace is not sought at the expense of the subjection and impotence of fighting groups. On the contrary, the State has encouraged collective action leading toward *a balance of industrial powers,* and it has moved decisively, if deliberately, to enforce upon parties the agreements arrived at, by limiting hostilities within the areas of contract. There is, in Sweden, no opposition to this status of the law among political or industrial leaders on either side, and it may be useful to try to state the necessary conditions without which it could not have been reached.

The first step was an unimpeded development on a voluntary basis of labor unions into a strong federation of employees on the one hand, and of employers into a strong national association on the other. Secondly, the struggle between these two camps came to be regarded as a normal outgrowth of capitalistic social organization, involving by its nature an unavoidable hostility which, however, the government has sought steadily to diminish by encouraging the parties to agree collectively to terms of peace among themselves. Such agreements, arrived at through innumerable collective contracts, coerced not by the government but rather through the power of the adversaries, provided a solid empirical foundation for subsequent legislation. Thirdly, beginning as purely private fighting groups, the federations of employees and employers came gradually to assume a considerable share of the burden of maintaining social discipline, a fact which was finally recognized in statutory terms. Thus law and practice make of these federations quasi-public associations with great powers and responsibilities.

In the United States these conditions are but partially met. The National Labor Relations Act seeks to foster and protect the organization of industrial workers, which is still actively opposed in some quarters, whereas in Sweden it was already an established practice in 1928 and today is practically unopposed. Here there is no central employers' federation organized specifically to oppose a great single federation of labor unions.[15] Our law, therefore, does not build upon an equilibrium of such established and equally balanced forces within the State. Nor have we such a homogeneous development of collective contracts based upon long experience which might contribute so forcibly as it has done in Sweden to a legal definition of rights and duties on both sides. Finally, the organization of private associations within the camps of capital and labor in the United States has not yet

(*Continued on page* 933)

by a collective contract, the association shall not arrange for or otherwise bring about the commission of hostile actions which under the first paragraph are unlawful, nor take part in unlawful hostile actions committed by a member, either by rendering assistance or in any other manner. An association which is itself bound by a collective contract shall be bound to endeavour to prevent its members from committing unlawful hostile actions, or, if such actions have already been committed, to endeavour to cause such members to undo them.

The provisions of this section shall apply even to contracts which contain clauses contrary thereto. If a collective contract contains provisions, imposing further obligations, the latter shall apply." (I. L. O., *op. cit.*, p. 1536).

9. *Lag om arbetsdomstol, 22 jun. 1928. (Svensk Författningssamling, 1928, Nr 254 s. 698*). English translation in I. L. O., *op. cit.*, p. 1539. See Sven Skogh, "The Labor Market and Its Regulation," 197 *Annals* of the American Academy of Political and Social Science (May, 1938), p. 40.

11. See note 4 above.

tion.

12. This article does not deal with chapter three, which provides a special mechanism of collective bargaining for organizations of employees registering with the Social Board and assuming certain obligations to delay the use of the weapons of industrial warfare. Though of great potential importance, the provisions of this chapter have not been extensively used to date.

13. Art. 3. This is comparable to our laws against the enforceability of "yellow-dog" contracts.

14. Arts. 4 and 5.

15. Cf. Joseph Mead, *op. cit.*, in note 5, *supra.*

THE PUBLIC AND THE BAR

Public Criticism of Bar Is Based Mainly on Following Grounds: Unwarranted Pretensions to a Knowledge of Ultimate Truth; Inordinate Delay in Legal Processes; Tendency to Make Justice Depend on a Contest of Wits; and Overcharging—These Accusations Not All Justified—American Bar Association Has Labored for Years to Mitigate Evils—But Full Story of What Legal Profession Is Doing to Serve Public Has Never Been Adequately Told—Need for Cooperation between Press and Bar

By Paul Bellamy
*Editor of the Cleveland Plain Dealer**

I ASSURE you there is not a newspaperman in the United States who would not have been flattered by the invitation which you so generously extended me to address the opening session of the Fifth Annual Meeting of the Junior Bar Conference of the American Bar Association.

This is because we have all been conscious in the last eight or ten hectic years that the yeast of social change had entered upon one of its more active cycles and that the responsibility of leadership had been laid, with ever increasing weight, upon all the instrumentalities by which men express and make effective their common aims. Such instrumentalities, to mention only four of the most important, are the church, the school, the bar and the press.

But to restrict our discussion for this occasion to the bar and the press, with which you and I are most familiar, I think we have a greater fellow feeling for each other's problems than ever before. This has been evidenced in recent years by the creation of the joint committee of lawyers and newspaper men to work out a larger degree of cooperation between bar and press. In this endeavor I have had the honor to serve as chairman of the American Newspaper Publishers Association committee. To be perfectly frank, we have not succeeded in resolving all our differences, but if I say it myself, we have made a valiant start. We have discovered that our points of agreement are far more numerous than our points of difference. We have established that for all practical purposes we want to go to the same heaven. And we have been commissioned to continue the effort to reach complete accord.

But I started out to say that in a time like the present, great obligations are laid upon those to whom great opportunity has been given. This goes for editors, and it goes for lawyers. Particularly does it lay a heavy hand upon you young lawyers, for in you is the hope of the future. You have been vouchsafed education far beyond the lot of ordinary man. You have had the Book of Knowledge opened for your perusal. You have taken solemn oaths to serve Justice. You can never forget the principle of *noblesse oblige*.

On our part, we of the Fourth Estate pledge ourselves to assume a similar great obligation.

Our subject today is "The Bar and the Public." And I take this to mean that we should counsel together as to the public's present estimation of the Bar, and what means may be adopted to improve the standing of the Bar with the Public.

If you ask me whether the lawyers of the country as a class are contributing as much as they ought to the betterment of society, I should be compelled to answer "No," and if you ask me whether the Public knows this, I should have to answer, "Yes." Mind you, I make no pretense to knowledge of the law. In fact, so far as the law runs, I am and ever will be a layman, but a friendly layman. Believe it or not, I have read or tried to read that eminent astrologer, the late Mr. Blackstone. Also I struggled for my sins through Coke —a most violent jurist,—upon Littleton. I will not bore you by mentioning such minor prophets as Mr. Chief Justice Marshall, Mr. Justice Story, et al. We are told that the scholastics of the Middle Ages practically decided how many angels could sit on the point of a pin, but the achievements of these theologians pale into insignificance, it strikes me, when compared with interpreters of the Draconian, the Justinian, the Napoleonic and the NRA codes.

I propose that we consider first what the public thinks of the bar, second what the bar has done up to now to improve its relations with the public, and finally, what further steps the bar might take in this direction.

In the days when I was in college and wanted above all things to be a lawyer, I use to think that the Law was an exact science. I believed that its general principles were so explicit that when they were applied to the circumstances of a specific case, all you had to do, as with an adding machine, was to pull a lever and the answer came down. Two and two always made four, never five, or, perish the thought, ten. Alack and alas for what thirty-three years in the newspaper business have done. I have seen emerge from the courts of law, especially where juries were involved, results which, to put it mildly, sound as fantastic at times as a chapter out of Grimm's Fairy Tales. A cynical journalist of my acquaintance is fond of observing when a public question gets into litigation, "The higher courts will have to guess that one and Heaven knows the outcome."

I resent that flippant remark, I still think that my boyish idea about the law being an exact

*Address delivered before the Junior Bar Conference at Cleveland July 24, 1939.

science had a great deal of sense in it. Certainly something is wrong when a considerable segment of the population believes, as it does, that going to law is like playing the slot machine—either you have good luck or you are SOL.

Criticism of the law and lawyers is no new thing in our race experience. Antiquity abounds with such criticism. It recurs in the Bible. The Saviour of mankind nearly always coupled the Scribes, most of whom at the period of the New Testament were lawyers, with the Pharisees, who, practically speaking, were the Economic Tories of those days. You all remember the quotation from St. Luke:

"Woe unto you, Scribes and Pharisees, hypocrites! for ye are as graves which appear not, and the men that walk over them are not aware of them.

"Then answered one of the lawyers, and said unto him, Master, thus saying thou reproachest us also.

"And he said, Woe unto you also, ye lawyers! for ye lade men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers.

"Woe unto you, lawyers! for ye have taken away the key of knowledge; ye entered not in yourselves and them that were entering in ye hindered."

And you and I remember also how in the Middle Ages, when the Peasant Rebellion blazed over Germany in 1525, that one of the most fervent prayers of the proletariat of the time was to be delivered from the swarm of lawyers who, like locusts, devoured them.

For a long time, indeed for centuries, lawyers and jurists paid scant attention to what the general public thought of them. Based on, and protected by, the absolute power of church or state, they did not have to. It is only since the rise of free democratic governments that the legal profession really began to place some value on public good will. And it is only fair to say that as far as this country is concerned, it was the American Bar Association which made the first intelligent effort to survey the situation and to do something about it.

What, then, are the most widespread criticisms of the bar? In line with the prescription that Whom the Lord loveth He chasteneth, I know you will not mind if I enumerate the principal counts in the indictment, and indicate a layman's judgment as to which are valid and which are not.

First, the public thinks that you give yourselves too many airs and pretend to a knowledge of ultimate truth which you do not possess. This pertains more particularly to judges than to barristers. I do not believe this is one of the serious sins of the bar. Where ground for this criticism exists, it is mostly a matter of bad manners and poor taste, and it is individual and not fairly to be urged against the bar as a whole.

Second, the public thinks you take a month to do a job which could be finished, with reasonable diligence, in a day. I believe this is one of the most serious and just criticisms of the bar. With painfully few exceptions the whole machine of justice, including lawyers, judges and minor court officials, resembles nothing so much as a slow motion moving picture. When a postponement of a day would be sufficient, counsel asks and the court grants postponement of a month. Unduly long vacations are the rule of the great majority of judges. The theory is that their prodigious expenditure of nervous and mental energy requires protracted period of leisure whereby to recharge the batteries of Eternal Truth. This does not fool the public, which rightly puts down such practices as sheer laziness. Ours is a streamlined age. Everything else under the sun has been speeded up. But we have only started to speed up the law. The problems confronting other professional men and in fact the problems of modern business executives, are every whit as intricate and difficult, in the opinion of the lay world, as those of the law, but they are often settled in split seconds. I am in favor of allowing time for reasonable deliberation to every lawyer, every juror and every judge, but I assure you the public believes that the present tempo of legal processes is inordinately slow.

Third, the public thinks that the court and the lawyers cooperate to make a game, or at least a test of wits, out of what should be a solemn process to arrive at justice. In my opinion there is much validity in this criticism in most of the state jurisdictions, but little or none in the federal courts. Too often the public has seen the litigant with the just cause lose because he was represented by a stupid lawyer and the wrong side win because of clever counsel. The public, in its uninformed way, thinks this is a wicked perversion of justice and that the set up should be changed in some fundamental way so that causes may be determined on a basis other than that of which side has smarter lawyer.

Fourth, the public thinks you charge too much for your services. I am not inclined to take much stock in this criticism as far as lawyers' fees are concerned, but I believe that court costs are too high because so many separate and individual steps are required in the progress of a case from its inception to the end.

I could enumerate other causes for popular criticism of the legal profession, but I am sure I have listed those most commonly made. And I am aware, as I have described this bill of particulars, that the American Bar Association has labored for years and labors today to mitigate every one of the evils complained of as well as to wage a ceaseless warfare against unworthy persons who occasionally break into the legal profession. Indeed, from the viewpoint of public opinion, too much stress cannot be laid upon the paramount necessity of policing your own risks.

This is the day and this America the place for widespread publicity on every public act and organization. I wonder whether the full story of what the legal profession is doing to improve itself and to serve the public has ever been adequately set forth. I suppose not, in spite of all the devoted efforts of the American Bar Association, its able committees and staff.

What a pity the general public will never receive more than the sketchiest impression of the admirable annual reports to this convention, setting forth the truly astounding scope of your work! Why do you insist on hiding your light under a bushel? I will venture to say that not one person out of 10,000 in the United States ever heard of

The Public Information Program of the Junior Bar Conference and this is only one, though to me by far the most interesting, of your many activities. May I not take this occasion to repeat the platform of the information program as stated by yourselves? I quote from the Manual:

"The purpose of The Public Information Program is to promote the accomplishment of the objectives of the American Bar Association and the Junior Bar Conference. The performance of this public service of enlightening the citizenry on subjects of national and local interest will result in mutual benefits to the public and the bar. As a consequence the public relations of the bar will be improved and public esteem for the legal profession will be increased."

It is further set forth that the scope of the national public information program during the present year is to be improvement in the administration of justice, and American citizenship. Surely there could be no higher aim than this. And the method chosen for achieving the result is to train groups of junior bar members who will inform the public from the rostrum and by radio upon topics cognate to the program.

In only one particular do I dissent from the procedure outlined in your manual. You say that these trained groups will go into action "when requested." That is not good enough. You must take the offensive. You cannot wait to be "requested" in the ordinary sense. You have to superinduce the requests. The whole country should have heard from you on this program, but only a smattering of us have. You need to pay more attention to your press relations. You cannot expect the newspapers and radio to hunt you up. They have a lot of other affairs on their minds. But I will wage you one thing—that if you do, you will find them receptive, if you realize that the first move must come from you. This may be a very good place to apply some of the cooperation I have already spoken of.

I wonder if you know how high a position you can occupy in public estimation, if you really try. I wonder if you know how glad we laymen are to see our lawyers coming when the great emergencies arise. Only the clergy and the medical men are as welcome as you in the most fateful hours of the average individual's life. And because you often do accomplish miracles for us, we expect you to accomplish miracles in other forms of activity, and notably in public life. Also, we expect you, in your own field, not only to practice law but to improve law.

I think it is a useful and an honest calling to interpret the law as it is written. I think it is a noble and an honest calling to narrate the day's events as they have happened. But I think it is a nobler and more exalted mission to make justice truly come down to dwell among men and as far as we of the Fourth Estate are concerned, to bring about a better state of society, by moulding public opinion to that end.

History tells us that the mores are always ahead of the law. I believe this is not only true, but proper and natural. Another and more brutal way of expressing the same idea is to say that the Supreme Court follows the sword, as in the Dred Scott case or that it follows the ballot box as in more recent matters.

I was against President Roosevelt's plan to pack the Supreme Court. I will live gladly under any system of society which my fellow citizens ordain by changing the Constitution of the United States according to the method provided therein but I do not go in for trick plays. And that, it seems to me, was the essence of the Supreme Court issue.

But, though I opposed the step the president advocated, I believe that he was right in feeling that sometimes there is too great a lag between the newer ethical concepts of an advancing society and their rendition into statute law.

You, as lawyers, tend, if I may be permitted once again to claim a layman's privilege, to put too much stress on precedent. If you can find a precedent in the common law going back to Star Chamber, it is regarded among your confreres as fairly sound, but, woe betide you if you are confronted before Mr. Justice Buzz Fuzz with a citation from Edward, the Confessor. May I say that to the unanointed this seems like balderdash?

The lay world has been delighted beyond measure in recent times by the new program of procedure in the Federal Courts. Personally I always gagged at the distinction between courts of law and courts of equity. It sounded to me like a frank acknowledgment that the average court of law had little or nothing to do with equity. The reform procedure will cut to the heart of the matters we are discussing. It will make justice more certain, more speedy and more economical. And my prayer is that the state courts will have the good sense to follow the example.

You are the cream of the young lawyers of the nation. I adjure you, as members of an ancient and illustrious profession, to remember the sacred obligation that has been laid upon you by the great jurists of the past. When you act for a client you must try to make his cause prevail. I realize that. But at the same time, do not forget that in the eyes of the public you occupy a position more exalted than that of a mere advocate, one which imposes upon you the badge of leadership.

I should like to see you step out more emphatically in all good efforts toward bringing the law up to the standards of public opinion.

I plead with you to increase your extra-curricular activities. I see no reason why a state's attorney of Queen Elizabeth's time who had successfully prosecuted a petty thief to the gallows should not have turned around the next day and entered the political arena to fight for the repeal of the laws which penalized so small a crime with so great a punishment.

The Greek philosopher was right who said that nothing was permanent except change. So long as you are content merely to defend things as they are you will never see the glory of the dawn of things as they ought to be.

I have known good lawyers and bad, as I have known good and bad newspapermen. I make no claim of perfection for my own calling. But this thing I know, that whatsoever calling a man chooses, he will find that there are certain pre-existing metes and bounds which condition him. And the pre-existent limitation against which all lawyers have to struggle if they are to become

effective agents of a better day, is the tendency to glorify the past. The past is always glorious, the present always doubtful, and the future belongs to our children.

Young lawyers of America, I implore you to interest yourselves in the economic, social and political affairs of the doubtful present. Name your own political party. That is your business. But do not be parrots and rest content merely to echo views of the comfortable past and comfortable client. You can make money that way. Many have, but it is death to the soul.

This is not a very perfect society in which we live, in spite of all our ministrations. You derive from Moses, the Law Giver, and I, from Gutenberg, that genius of the fifteenth century, who invented movable type—may he be happy in Paradise! What more auspicious occasion than now for us to make a firm alliance between the Bar and the Press, to the end that this imperfect society may be made perfect and that our beloved country may rejoice therefor. I have an abiding faith that this will be done!

The Revised Bankruptcy Act of 1938

(*Continued from page* 884)

increase of 16%, Congress thought it imperative to give direct consideration to the problem of amortizing the debts of wage earners. The subject also had consideration in the survey made by the Department of Justice, and was of special concern to Mr. William Lloyd Garrison, who, I am informed, worked out a section of the Hastings-Michener bill for that purpose. With the failure of that bill to pass, efforts were made to adapt Section 74 of the Act to the needs of wage earners, or consumers, but, as Section 74 was designed primarily to rehabilitate the small business man, and as the expense of carrying through a proceeding under that Section was entirely out of proportion to the benefits which any wage earner could get from the Section, use was made of Section 74 by wage earners in only two or three jurisdictions.

However, in Birmingham, Alabama, a special referee was appointed to administer Section 74 petitions by employees for amortization of their debts, and the experience of that Special Referee, the late Valentine J. Nesbitt, was so satisfactory that a separate chapter, number XIII, was written and incorporated in the new law to make possible the gradual liquidation of the debts of persons earning annually not more than $3600.00, Section 74 being repealed.

It is apparent that the underlying purpose of Chapter XIII is to reduce the number of ordinary bankruptcy proceedings and eventually, if possible, eliminate them. With the debtor under the protection of the Court and safe from the harassments of process-servers, high pressure salesmen will find it unprofitable to extend further credit to him, and Chapter XIII will tend to teach frugality and good husbandry as well as promote the general welfare of society.

The story of the changes in the bankruptcy law unavoidably consists for the most part of the history of countless changes of detail, many of which must remain unintelligible to the greater portion of the public. The new Bankruptcy Act is not perfect. It is more conservative than many would wish, and not as radical as some would have it. It is a composite, representing a concensus of opinion of men familiar with the subject and approaching the problems from every viewpoint—the court and its administrative officers, the bar, the creditor, the debtor, the public, the law text-writer, the law school instructor, and the economist. The new act is believed to be thoroughgoing. Its authors were careful to preserve those parts of the prior law that experience had shown to be desirable but they did not hesitate to amend drastically or to adopt new measures wherever they seemed necessary. As opinions and conditions change, so must the law. Justice being its end, circumvention must not thrive, and when the law can be made an instrument of abuse, the hour for reform has struck. Indeed, although ultimate justice may be achieved, where delay and expense reign supreme, the courts become at last a happy hunting-ground for the fraudulent.

> "We must not make a scare-crow of the law,
> Setting up to fear the birds of prey,
> And let it keep one shape until custom make it
> Their perch and not their terror."

Bankruptcy has been a cruel hoax to thousands of debtors and creditors, but if the Act of 1938 is received in a spirit of confidence in its integrity, it may escape the unpopularity of its predecessors and become an instrument of constructive service to the American people.

The passage of each general bankruptcy law has marked the beginning of a new era in American life, although three of the four basic bankruptcy statutes were repealed at the behest of dissatisfied constituencies. May the Bankruptcy Act of 1938 usher in an era of lasting prosperity and good feeling!

DONALD R. RICHBERG
Chairman, Committee on Commerce

JUNIOR BAR NOTES

By Joseph Harrison
Secretary of Junior Bar Conference

EXCEPTIONAL progress has been made in launching the 1938-1939 program of activities of the Junior Bar Conference. Under the energetic leadership of Chairman Ronald J. Foulis, St. Louis, Missouri, there has been little or no time lost in completing the organization for this year. Within eight weeks after the Cleveland meeting, fifty-one State and territorial chairmen appointments and sixty-one standing committee appointments, have been made and accepted. Considering the relatively short time elapsed there has already been an unusual amount of Conference activity in every section of the country. Mr. Foulis has addressed Junior Bar meetings in Colorado, Oklahoma, Missouri and New Mexico. By his travels, communications, instructions and personal appeals during the first few weeks, the chairman has set a lively pace for his fellow members of the Conference's official family.

Colorado First Scene of Activity

Colorado, with Mark H. Harrington, Denver, Colorado, as state chairman, was the scene of the first Junior Bar activity for the current year. On September 9 and 10, a large group of the younger members of the Colorado bar met in Colorado Springs for the purpose of effecting a Junior Bar organization. The meeting was part of the program of the annual meeting of the Colorado State Bar Association. Mr. Foulis and Mr. A. Pratt Kesler, of Salt Lake City, Utah, council member from the Tenth Circuit, addressed the general meeting. Chairman Foulis explained the nature and program of the Junior Bar Conference, the extent of its participation in the American Bar Association work, and spoke about the work of the more important committees laying particular stress upon the Public Information Program. He further pointed out that Conference members would gain for themselves a certain amount of recognition in the community by participating in the program; that the primary purpose of the Conference was not the economic advancement of its members through such work, but rather to strengthen the profession by informing the public of the work of the Conference, the American Bar Association, State and local associations and the profession in general. Mr. Kesler described the work of the Conference, with illustrative references to some of its accomplishments within the State of Utah. After these addresses, Mr. William F. Denious, retiring president of the State Association, turned the meeting over to Mr. Harrington, who presided during the organization meeting. After some explanatory remarks setting forth the work that had already been done during the past year to lay the groundwork for the organization, a set of by-laws was presented to the meeting by Mr. Harrington, who had been authorized to prepare them at a meeting held in July.

These were adopted and a resolution was passed authorizing the chairman to apply to the Junior Bar Conference on behalf of the new Colorado Junior Bar Conference for affiliation as a State unit under the new amendment on this subject adopted by the Council at Cleveland. Copies of the by-laws and petition for affiliation have been received by the Secretary for council approval. Complete cooperation was received from the Colorado State Bar Association in the formation of the new unit. The new chairman has pointed out that one of the aims of the organization will be to assist the State Association in effectuating its program. It is also the particular hope of the officers that the new organization, in cooperation with the Junior Bar Conference, may give its attention to those problems which peculiarly affect the younger members of the bar of Colorado. At the well attended banquet held on Saturday evening, September 10, the new organization was warmly greeted by Hon. Frank J. Hogan, President of the American Bar Association, and by Judge Alfred P. Murrah, of Oklahoma. Already twelve judicial district chairmen out of fourteen have been appointed and acceptances have been received from chairmen of all twelve committees. There are now bright prospects for an active organization to carry forward the Junior Bar Conference program in Colorado.

New Lawyers Entertained in Oklahoma

In Oklahoma City, Oklahoma, on the evening of September 13 the Junior Bar Conference, with James D. Fellers, as Oklahoma State Chairman, held a welcoming banquet at the Hotel Biltmore to welcome into the profession the ninety-seven new lawyers who had been sworn in as attorneys before the Supreme Court earlier that day. Chairman Foulis was in attendance and explained the Conference's purposes and the opportunities it afforded to the young lawyer. Harold Stuart, of Tulsa, an active Junior Bar member, in his address, also created considerable interest in the Conference. The generosity and assistance of individual members of the Board of Governors of the State Bar helped solve some important financial details. Present at the banquet were eight of the nine Supreme Court judges, two of the three judges of the Criminal Court of Appeals, the State Attorney General, the Chairman of the State Industrial Commission, the Chairman of the Tax Commission, the Chairman of the Corporation Commission, the Secretary of the State Bar, members of its Board of Governors and law professors from surrounding law schools. The presence of such dignitaries, men who make, administer, enforce, teach and practice law not only gave dignity and importance to the occasion, but accurately symbolized the profession into which the new attorneys were being welcomed. From every aspect the affair was preeminently successful. The splendid cooperation given the Junior Bar Conference by the older men and men prominent in the state's affairs doubtlessly was a most important factor in its success. The initiative of the Oklahoma Junior Bar leaders and the enlightened cooperation of their elders furnish an excellent formula for successful and effective bar work. Such an affair has taken

place in a few other States. It also may be considered as a worthy suggestion to others. Ben Franklin, Oklahoma City, the newly-appointed vice-chairman of the Oklahoma Junior Bar Conference, was general chairman of the banquet. He was assisted by R. Dale Vleit, also from Oklahoma City, the State secretary. Mr. Fellers, as State chairman, presided.

A plan is being considered by the Oklahoma organization whereby the state Conference will obtain for each newly admitted lawyer an older "sponsor" for the first year of his practice to whom he may go freely for advice and counsel and who will give him whatever assistance possible in becoming acclimated to the profession. With such ideas and with men willing to give the necessary time and effort to interpret the Conference program into action, Oklahoma should soon be a conspicuous State in the work of the Junior Bar Conference.

In the Seventh Circuit, Council Member James P. Economos, Chicago, Illinois, called a planning meeting for September 8th at Chicago. The conferees were Norman Hartzer, of South Bend, Indiana State Chairman, John C. Doerfer, of West Allis, Wisconsin, State Chairman; Amos Pinwerton, of Taylorville, Illinois State Chairman; Willet N. Gorham, of Chicago, Illinois State Director of the Public Information Program; Donald B. Hatmaker, of Chicago, one of the Conference's organizers and at present a member of the House of Delegates; Donald Vedder, Chicago, Chairman of the Younger Members Activities of the Chicago Bar Association, and Mr. Economos. The meeting was held for the purpose of organizing the work to be done in the Seventh Circuit. Tentative plans for a regional meeting were discussed as well as methods of conducting the Public Information and Membership Campaigns during the current year.

John J. Sirica, Conference Chairman for the District of Columbia, has appointed Philip F. Herrick, Director of Public Information for the Capitol City and Lester Cohen, District Secretary. Here there will be emphasis on the speaking program with a series of notable talks planned under Junior Conference auspices. Similarly, plans for an active year are being prepared in Montana, where State Chairman Wesley W. Wertz, Helena, has announced the appointments of Russell E. Smith, of Missoula, as State Director of Public Information and Samuel M. Bowe, of Cut Bank, as chairman of the State Membership Committee. The membership work will receive first attention here.

The work of the Public Information Program and the American Citizenship Committee of the Association was advanced at Columbus, Ohio, during the observance of Constitution Week. Earl F. Morris, Columbus, Ohio, Council Member from the Sixth Circuit, has reported that the program was sponsored by the American Citizenship Committee in conjunction with the local Junior Chamber of Commerce. Beginning on Monday and running through Friday there was a fifteen minute broadcast each evening. These addresses were all made by young lawyers. Speakers were assigned to each of the five local high schools with members of the Political Science faculty of Ohio State University also participating in the programs.

J. Malcolm Shull, Elizabethton, Junior Bar Chairman for Tennessee, arranged for a number of appropriate addresses in the schools of East Tennessee in observance of Constitution Week. Roy C. Nelson of the Elizabethton bar delivered an address on the Constitution over Station WOPT at Bristol on September 19th, and further plans are reported by Howard W. Pritchard, of Memphis, State Director of Public Information.

In Michigan, State Chairman Leroy W. Dahlberg, of Detroit, is preparing for an active Conference year. He will have the assistance of Gerald E. White, of Grand Rapids, State Director for the Public Information Program and Austin Fleming, of Detroit, Chairman of the State Membership Committee.

An enthusiastic luncheon meeting of the Junior Bar was held at Montpelier on October 5 during the day of the Vermont State Bar meeting at which the Honorable Thomas B. Gay, Richmond, Virginia, Chairman of the House of Delegates of the American Bar Association, Mr. Walter Triton, Rutland, Vermont, and Mr. Willsie E. Brisbin, Burlington, Vermont, spoke, with Mr. Osmer C. Fitts, of Ludlow, Vermont, State Chairman for the Conference, presiding. The success of this luncheon has established it as an annual affair hereafter.

The Conference in New Jersey with Leon Dreskin, Newark, as state chairman, has arranged for several speaking engagements in connection with the Public Information Program. As part of the Conference's program adopted at Cleveland an effort is to be made this year to obtain support for the passage by the State Legislature of an act providing for a legislative reference and bill drafting bureau. Mr. Dreskin has also been cooperating with local bar groups in their efforts to secure for younger members of the bar assignments by the City of Newark of tax lien foreclosure work.

Council Member H. Howard Cockrill, Little Rock, Arkansas, representing the Eighth Circuit, cooperated with the Junior Bar Section of the Arkansas State Bar Association in making a success of a state-wide meeting held at Little Rock on October 14.

The Junior Bar Conference in New Mexico was invited to take a place on the program of the annual meeting of the State Bar of New Mexico held on October 14 and 15 at Albuquerque. Mr. Foulis addressed the meeting on October 15. He reviewed the history of the Conference and presented the program for the present year, pointing out the advantages of active participation therein both to the young lawyer and to the organized profession.

A luncheon was held following this meeting at which Mr. Ross Malone, Jr., of Roswell, State Chairman of New Mexico, presided.

The officers and council of the Conference will meet at Chicago on January 7 and 8, 1939.

Collective Bargaining in Sweden

(*Continued from page 927*)

progressed to the point at which public functions may concededly be devolved upon them. As opposed to totalitarian régimes, of course, both countries preserve a high degree of freedom of association both for employers and workmen. One result of this is collective action of a competitive, and indeed often of a hostile nature. The Swedish and American governments have been slow to interfere with this exercise of group power. The Swedish practice, however, indicates that these associations can be put to public use without destroying their autonomy.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE CRISIS OF DEMOCRACY, by William E. Rappard. 1938. Chicago: University of Chicago Press. xiii, 288 pp.—Twenty years ago the Western World believed that the stars in their courses were carrying all the nations of the earth in the direction of democratic government. This drift seemed inevitable and to most minds healthy. Books and orators were debating only such questions as the workability of varying forms of democracy. The direction of development, of "progress" as we called the flow, was axiomatic, like an astronomical rule. The conviction we held had been crystallizing for perhaps three centuries. Today thoughtful men are in doubt about the whole business. Like the Newtonian system of natural laws, our scheme of political faiths has been suddenly undermined by events as striking as if the moon had wandered from its orbit. This is Professor Rappard's topic in the Harris Lectures delivered in Chicago in August and already available here within covers.

The author is professor at the University of Geneva, a busy Swiss public man and a well-known writer on government and the League. He writes English with easy skill and charm, lightens his pages with quotations and illustrations, has a command of European history, and avoids too much of the sort of political abstraction which makes thin soup for common diet. The book is the pleasantest reading we happen to have seen in the flock of books on so somber a subject, and among the best informed. There is one caveat. He rides a hobby at the end.

The volume begins by intimating that all political ideals and convictions in history have been transitory and we should have known better. Democracy, he says, sprang from the aspiration for two conditions: equality and liberty. These aspirations were really protests against specific conditions, rather than ideals in themselves. The democracy we developed to meet these protests has taken all sorts of forms, in which popular control of the state is the one common denominator.

The development of self-government has collided with three difficulties of reconciliation, the author goes on to say. First is the reconciling of equality and liberty, second of democracy and efficiency, thirdly of democracy and war. Sketches of the historical forces which gave impetus to democracy in Europe, of the Greek prototypes, the place of Christianity, of Teuton traditions born in the woods of the North and matured in Britain, of the French and Swiss origins, are followed by chapters on the visions of popular sovereignty in triumph after the war and of the lapse into those dictatorships that brood over us now. Even in France, Great Britain, and Switzerland the people wear uneasily their crowns. There is comfort in noting that the disaster seems to center in peoples who are new to freedom. Dictatorships have seldom been tolerated during prosperity. After all, the war was a victory for the free peoples on the whole, and these also have had the most well-being in the last two decades.

In any case, the author feels that without peace there is no hope. This is the be-all and the end-all of the dream for popular government. Democracy may stumble at managing the modern state but it cannot make headway at all on a military terrain. Only the author's optimism leaves him with a cheerful epilogue.

To this reviewer, after following as he has the clear stream of history which Professor Rappard has traced, the closing pages fail to meet the issue. War at its worst is only an ugly interlude in the lives of common men. This is true even of the author's Switzerland, a mere island in the angry sea of Europe. The exigencies of domestic government and not those of international rivalries will control the trend of institutions. Peace is too simple a solution to offer and too difficult to attain.

The very creation of the extensive administrative machinery which is demanded by our current mood to regulate a complicated but productive economy may decentralize the state and cushion the consequences of volatile public opinion. Society like the individual human body soon builds defenses against its own vices. The world of 1930, like that of 1830, is still in the convulsions of reorganization after a cataclysm. The patient is still too close to his operation to permit of much prognosis. His future rests with the quotient of a complex of economic forces and spiritual ideals which turn on no such easy answer as the maintenance of peace. If democracy, as most men still believe, remains on comparison the healthiest of the choices between imperfect alternatives, we should keep on mending and tinkering at all the points where the machine fails or squeaks in fair weather or foul and not despair of it until the climate changes. This attitude is the only really fruitful means of making advance that man has ever attained, in mechanics, economics, or politics.

The little volume is worth a week of anybody's evenings, for it puts in order agreeably and deftly a swarm of disconcerting thoughts that plague our day. The material which the author assembles is already affecting political thinking and practical politics in Europe. So far, America is only faintly influenced, but we are bound to hear more of it.

JAMES GRAFTON ROGERS.

New Haven, Conn.

Italy at the Paris Peace Conference. By René Albrecht-Carrié. 1938. New York: Columbia University Press. Pp. 575. For years, long before he threw in his lot with Hitler in the crisis of September 1938, Mussolini has been denouncing the peace treaties of 1919-1920, partly because they gave Italy too small a

share of the spoils of the Great War, partly because of their alleged injustice to the ex-enemy states. An account, therefore, of Italian action at the peace conference is very welcome, especially when it is as judicious and comprehensive as the present work. The second volume to appear in the series "The Paris Peace Conference: history and documents" published by the Carnegie Endowment for International Peace, it gives as complete a narrative as is possible when many important documents are still locked up in the archives; so much is revealed, however, by memoirs and anonymous publications that there are probably few secrets left. The author writes as an historian, not as an advocate, and possesses both a proper comprehension of the processes of diplomacy and a straightforward style which enables him to present the issues with clarity and succinctness. In the nature of things, however, the book makes rather heavy reading, for it is largely the record of innumerable proposals by the Italian, Yugoslav, American, British and French governments for the settlement of Italy's European and African frontiers; often the differences were relatively slight and constant reference to the maps is essential for their understanding. Nearly half of the book consists of documents, some of them not easily accessible to most readers. The author is to be congratulated on a useful and adequate study.

When, in August 1914, Italy declared that her allies Germany and Austria-Hungary had embarked on an aggressive war and she was not required by the Triple Alliance to follow them, it was inevitable that she should join the Entente Powers sooner or later. Otherwise she would be left out of consideration when the map of Europe should be redrawn after the war. Allied necessity enabled Italy to drive a hard bargain —the Treaty of London of April 26, 1915—and later to obtain the promise of a share of the Ottoman Empire. The Italians were well aware that their pretensions were incompatible with Wilson's Fourteen Points, but they were prevented from making any reservations. At the peace conference they committed the capital error of claiming Fiume in addition to what they had been promised by the Treaty of London. Not only did they fail to break down the opposition of Wilson, but by concentrating on Fiume they lost out in the partition of the Ottoman Empire, and they paid comparatively little attention to African colonies. In the end Italy obtained less than she had been promised in 1915, both in Europe and overseas. For this, of course, Mussolini blames the greed of the Allies, and certainly this was important; but no reader of this book can fail to conclude that the fault was in no small degree the atrocious diplomacy of the Italian government. Which explains why Mussolini is so bitter about the matter.

BERNADOTTE E. SCHMITT.
University of Chicago.

Colonial Blockade and Neutral Rights, 1739-1763. By Richard Pares. 1938. New York: Oxford University Press. 309 pp. The dearth of knowledge about the origins and development of international law is prodigious. In recent years some good research on certain historical aspects has been done, but in the main the material available to the ordinary student has been rather superficial. Standard texts tend to duplicate one another and to repeat lifeless phrases like "free ships free goods" without much explanation as to the flesh and blood happenings which called such slogans into being. This volume, therefore, by Mr. Pares is heartily welcome, for he has dug deep into old records, decisions and dispatches and has emerged with the clearest, most complete account yet of the beginnings of some of the highly controversial and significant international law rules relating to neutrality.

The book is not recommended for the layman without some background, except perhaps for reference purposes, as it is replete with closely reasoned analyses of hitherto obscure cases and diplomatic controversies, though certain chapters, such as the opening ones on the technique of privateering, should be fascinating to any one. To the international lawyer, however, the work is invaluable for the light it sheds on the origins of the so-called Rule of 1756 and of the Doctrine of Continuous Voyage. Nothing so comprehensive or so capably reasoned has appeared before on these particular topics. In fact, Mr. Pares for the first time has really torn away the veil of mystery which has obscured the inception of the Rule of 1756, that British-born regulation to the effect that when a neutral ship engages in commerce between a colony and a home country, a trade prohibited to outside states in peace time, that vessel forfeits its immunity and identifies itself as a belligerent vessel, liable to capture.

In their endeavor to circumvent the rigors of this rule, which was designed to stifle trade between France and her American possessions during the Seven Years War, the Dutch resorted to transshipment devices which forced the British courts to look at the whole journey of the goods involved and to apply what came to be known as the Doctrine of Continuous Voyage. This doctrine, amply embellished by American Civil War experience, served as the real basis for the "blockade," in the World War, of Germany by the Allies, who throttled the commerce going to Holland and Scan-

LIONEL P. KRISTELLER
Chairman, Section of Insurance Law

dinavia on the ground that articles ostensibly destined for a neutral were really headed for the enemy. The Doctrine is thus of great importance in international law and to have insight into the way in which it began is an immeasurable gain.

Mr. Pares links the legal developments to the political and economic needs and realities of the period, showing *why* such and such was deemed necessary. For example, he makes exceedingly clear the reasons for the English attitude on "free ships free goods." There are also some absorbing pages on the prevailing attitudes toward the nature of international law, opinions which hold much of interest in the light of contemporary scoffings at the reality of international legal rules. It is to Mr. Pares' great credit that such a finished, intelligent and scholarly book has been made available.

PAYSON S. WILD, JR.

Harvard University.

Libel and Slander in a Civil Action, with Precedents of Pleadings and Dominion and American Cases, by the late Clement Gatley. Third Edition, by Richard O'Sullivan. 1938. London: Sweet & Maxwell, Ltd., Stevens and Sons, Ltd. Pp 962. I lay no claim to any special familiarity with English text books on, or with the practice of, the law of libel and slander in England. But I have read a little of English text and case book law in general, and have some knowledge of the law of slander,—in its origins and development, at least in England, perhaps the most artificial of all judge-made law.[1] That reading and knowledge is sufficient, I think, to justify my saying of the book under review, that in organization, scope and treatment, it is a thoroughly worthwhile book. It should prove itself invaluable to the English practitioner in this field. For, thorough and voluminous, it lights and guides his feet upon the artificial way the law has gone, not only generally, and in matters of substance, but particularly and precisely, in matters of procedure as well.

It contains, if you include index and table of cases cited, more than a thousand pages. Nearly five hundred of these are devoted to the substantive law. Three hundred deal completely, precisely and in detail with practice. Complementing and supplementing these, there is an appendix presenting more than a hundred pages of forms and precedents, ranging from demand for apology, to a motion for new trial, and one setting out the English statutes bearing on the action.

Because of its definitely English character, its primary concern with and exposition of English law and practice, the book, notwithstanding its citation of nearly a thousand American cases, will have very little value for the American lawyer, as a working tool. American lawyers and others, however, who are interested in the subject treated, and not merely in books which can be used as working tools, will find this one well worth reading. Attractively gotten up, printed in large, clear type and on good paper, it is ponderous only in outward appearance. Its reading will give a more realizing sense of the close, the essential kinship between the American and the English action, and thus a better understanding of the law of libel and slander in the States, as it has been acted on by statutes and judicial decisions here.

The copious extracts the book has made from the numerous decisions will give the reader, too, a better, a completed understanding of the essential differences there are between the English and the American viewpoint toward, and feeling for, the action. He will understand and realize, better than he has ever done before, the complete Englishness of that most English of all English pastimes, suing for libel or slander; that most English of all English institutions, a libel or slander suit.

JOSEPH C. HUTCHESON, JR.

Houston, Texas.

The Trial of Bruno Richard Hauptmann, by Sidney B. Whipple. 1937. New York: Doubleday, Doran & Company, Inc., Pp. 565—This book is a relief from the many ill-founded and misleading articles that have been printed about the most noted criminal trial in the annals of American courts.

The book is divided into two parts. The first part briefly narrates the history of the crime, and the subsequent extensive investigation culminating in the arrest of Bruno Richard Hauptmann, his extradition trial in the Bronx, a general summation of the evidence for and against Hauptmann at the trial in New Jersey, a description of the jurors, the trial tactics of the lawyers, the conviction and subsequent appeal, the participation in the case of Governor Hoffman after the conviction, the extorting of a false confession from Paul H. Wendel, and other interesting highlights of the case.

The last, and major part of the book, is devoted to excerpts from the transcript of the actual testimony given by the witnesses in the trial. It also contains the principal parts of the opening statement of Attorney-General David T. Wilentz for the State of New Jersey, of the opening statement of C. Lloyd Fisher for the defense; of the closing summation of Edward J. Riley for the defense, and of David T. Wilentz for the State. It also contains the charge to the jury by Justice Thomas W. Trenchard.

The author, Sidney B. Whipple, is an excellent writer of wide experience. He was assigned to the Lindbergh case as a reporter immediately after the kidnapping, he kept that assignment during the two and one-half years of the investigation, and he covered the entire trial of Bruno Richard Hauptmann.

This famous case will be discussed and argued about as long as this generation lives. Not because of Hauptmann, but because of the heroic, world-renowned Lindbergh. A criminal case usually attracts attention in proportion to the prominence of the principals, to the heinousness of the crime, or its unusualness. The Lindbergh case combined all of these factors. It is by all odds the most publicized criminal case in American history. Rumor, exaggeration, partial truths have constituted a large part of that publicity.

The author briefly describes how Colonel Charles A. Lindbergh and Anne Morrow Lindbergh built a beautiful home back among the Sourland Hills of New Jersey, away from all glamour, where they could raise

1: "This is not a question of principle, but of judge-made law." Bray, J. in *Hellwig vs Mitchell* [1910] 1 K. B. 609, at p. 613.

"The law of slander is an artificial law, resting on very artificial distinctions and refinements, and all that the Court can do is to apply the law to those cases in which heretofore it has been held applicable. It is not like a law founded on established principles, where the Court applies settled principles to new cases, as they arise, which fall within them." Swinfen Eady, L. J. [1916] 1 K. B. 351, at p. 358.

"Where we are dealing with such an artificial law as this law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of cases in which it has not hitherto been held to lie, it is the Legislature which must make the extension, and not the Court." Lord Herschell in *Alexander vs Jenkins* [1892] 1 Q. B. 797 C. A., at page 801.

their son to be a normal American boy,—*their son*, whose birth was acclaimed throughout the world, of whom Heywood Broun wrote: "His background is that of wealth and fame, of courage and high reputation. But I am already moved to compassion. He cannot possibly realize yet the price he must pay for being a front-page baby. He will." Prophetic words!

The child flourished. He was a bright, normal, beautiful boy. All was well until that fateful night of March 1, 1932. At 10 o'clock that evening Betty Gow went to the nursery, as was her custom, to see how the twenty-month-old baby was. The crib was empty!

In place of the child was a ransom letter demanding $50,000 for his return. Outside the house some fifty feet away was a peculiar ladder, built in three sections. Whipple tells interestingly of the receipt of fourteen ransom letters, culminating in the payment of $50,000. These three telltale physical evidences, that is, the *handwriting*, the *wood* in the ladder, and the *ransom bills*, were later to be referred to as being the most crucial evidence in the case. For, after reviewing carefully all of the evidence, the Court of Error and Appeal of New Jersey in a strong opinion stated:

"Our conclusion is that the verdict is not only not contrary to the weight of the evidence but one to which the evidence inescapably led. . . . from three different and, in the main, unrelated sources, the proofs point unerringly to guilt, viz., (a) possession and use of the ransom money; (b) handwriting of the ransom notes; and (c) the wood used in the construction of the ladder."

There are many phases of the Lindbergh kidnaping and subsequent trial of Hauptmann that can be intelligently discussed only by one who has had a thorough knowledge of that case in all of its varied ramifications. There are many questions regarding the evidence that were answered to the satisfaction of the jury and the court, but which are either not known generally or have been confused in the minds of the public. Whipple answers many of these questions in this book, among them: Did Hauptmann have a fair trial? Why was the handwriting in the ransom letters such damaging evidence against him? How was he eventually suspected and arrested? How did the wood expert trace the wood in the ladder to Hauptmann? Who was Isadore Fisch, and why did Hauptmann attempt to throw the blame on him? How did it happen Dr. Condon was selected as the intermediary by both Lindbergh and the kidnaper? What was Hauptmann's criminal record in Germany, and why was he in the United States, an escaped felon?

Whipple recites how the cranks, the weak-minded, the criminally unbalanced, furnished hundreds of false clues, which the indefatigable Col. H. Norman Schwarzkopf and his New Jersey State Police ran down and exposed.

The author writes logically about the value of circumstantial evidence. He discusses succinctly various phases of the testimony and points out some of the evidence that convinced the jury. Among this evidence was a ransom bill found in Hauptmann's pocket when arrested and over $14,000 more hidden in his garage; the expenditure of large sums by Hauptmann, including sending his wife to Europe, even though he had no apparent income; the linking of Hauptmann to the writing in the ransom letters by eight handwriting experts selected from all parts of the United States, who made independent examinations and found Hauptmann's characteristics of handwriting, misspelling, and sentence construction in the ransom letters; the identification of Hauptmann's plane as having been used in planing the boards in the ladder; the identification of one board in the ladder as being sawed from a floor board in Hauptmann's attic; and the identification of Hauptmann by Lindbergh, Condon, and others.

In writing about the excellent work of the wood expert in tracing the wood in the ladder to Hauptmann, Whipple refers to it as being such conclusive evidence as to "convince even the most skeptical that one of the ladder rails (the famous Rail 16) was originally part of a board that came from Hauptmann's attic." In speaking of the handwriting testimony he writes, "The array of handwriting experts presented by the State was overwhelming. It is worthy of note (to escape from the official record for the moment) that six handwriting experts volunteered to examine the ransom notes and the conceded writings of Bruno Richard Hauptmann for the defense. After their examination of the documents, in Trenton, five of these experts withdrew from the case. They gave no reason for their disappearance, but their action may be said to have spoken for itself."

Whipple extols the dignity, the fairness, and the humaneness with which Justice Trenchard presided over the trial, saying of him: "Justice Thomas W. Trenchard, a jurist wise in years, meticulous in legal form, humane in spirit, ever held before the minds of the jurors the necessity for impartial consideration and the shutting of their ears and eyes to any outside manifestation likely to influence their judgment. He rebuked in strong terms those who disturbed the orderly procedure of the court, and in fact constituted himself a shield between the jury and the outer world."

It may be that Whipple over-emphasizes the im-

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portance of certain evidence in the case and underestimates the value of some, but the book fairly represents the observations and impressions of the author, who is an experienced observer. Obviously, in a book of this kind, although some 450 pages are devoted to it, all of the transcript of the testimony cannot be included. Even copious excerpts are open to the criticism that they were selected to represent the viewpoint of the writer. The question naturally arises, "Do the excerpts in this book quoted from the testimony fairly represent each witness' testimony?" In the main they do, but not entirely. Perhaps no layman could analyze a transcript such as this one, containing a million words or more, and select just the evidence which would portray an entirely correct picture of the case for and against Hauptmann. A remarkable feature of this book is that the author has accomplished this task as well as he has.

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Los Angeles.

Summaries of Articles in Current Legal Periodicals

BY KENNETH C. SEARS

Professor of Law, University of Chicago

CONSTITUTIONAL LAW

RECENT Decisions On The Power To Spend For The General Welfare, Vincent D. Nicholson, 12 Temple L. Quar. 435. (J1. '38; Philadelphia, Pa.)

The decisions considered are recent because there are no old ones on the market for criticism. Our case law concerning the general welfare clause is a New Deal affair. Out of them the author has constructed four propositions. (1) A proposed expenditure for the general welfare is not subject to legal attack except in a justifiable controversy at the instance of a party who can show a direct and therefore an actionable injury. (2) The powers to tax and to spend for the general welfare is independent and not limited to the other enumerated fields of federal authority. (3) Taxes cannot be levied nor funds expended for the primary purpose of purchasing in compliance with a policy of regulation. (4) There is no invasion of the reserved powers of the states by a system of taxing and spending under which the states are induced to collaborate with the nation in relieving a social need that is national in scope. Then there follow four doubts. (1) There are no established criteria for determining what constitutes a public rather than a private, a local rather than a general purpose. (2) To what extent does the doctrine of unlawful delegation of legislative power apply to appropriations for the general welfare? (The author's belief, however, is that the doctrine of the Panama and Schechter cases does not apply to appropriations). (3) With respect to the conditions which lawfully may be attached to a loan or a grant there is a wide middle ground in which the few authorities are in confusion. (4) May the federal government own and operate facilities for the promotion of the general welfare and for that purpose may it exercise such sovereign powers as the right of eminent domain?

CRIMINAL PROCEDURE

A Rounded System of Judicial Rule-Making, Homer Cummings, 72 United States L. Rev. 337. (Je. '38; New York City.)

Instead of merely celebrating the adoption of the new Rules of Civil Procedure for the District Courts of the United States, Attorney General Cummings proposes that the profession march on to a complete conquest. The rule-making power should be extended to criminal procedure prior to verdict. At the present time by virtue of a statute, federal criminal procedure is "a strange admixture" of a few specific national statutes and "the common law as modified by state constitutions and state legislation." The result is uncertainty, confusion, and "entanglements of ancient common-law procedure." The Model Code of Criminal Procedure adopted by the American Law Institute in 1930 has much that will be of value in the task of drafting the proposed rules.

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FEDERAL JURISPRUDENCE

The Collapse of "General" Law In The Federal Courts, Charles T. McCormick and Elvin Hale Hewins, 33 Illinois L. Rev. 126. (Je. '38; Chicago, Ill.)

The overruling of Swift v. Tyson brings forth another discussion. The authors rejoice and the happy spirit of victory produces enjoyable reading. But they are not convinced, as was the Supreme Court, that historical research has definitely shown that Mr. Justice Story and his colleagues misinterpreted the intention of the draftsman of the Rule of Decision Act and of the Congress which enacted it. The justification for declining to follow Swift v. Tyson arises from a conviction that after nearly a century of experience with it, the doctrine was not expedient. The Court's excursion into a constitutional justification for the reversal is criticized and there is a suspicion that the motive for this was the necessity of obtaining a majority of the court which was favorable to undoing what Story had done. On this point the opinion of Mr. Justice Reed is preferred and previous decisions in admiralty cases seem to show that the majority headed by Brandeis was wrong in its constitutional argument. New problems will arise as to the consequences of the decision in the now prevailing Erie R. Co. v. Tompkins. (1) A line must be drawn between substance and procedure. As to the latter the national courts are now governed by their own rules. (2) What will happen to the repudiation cases such as Gelpke v. Dubuque? (3) What will determine which state's substantive law will be applied by the national courts. (4) "Will the march of conformity to state law be completed in equity" . . . ? (5) Will there be repercussions in admiralty law?

TRADE REGULATION

Trade Association Reporting Under The Anti-Trust Laws, Benjamin S. Kirsh and Harold Roland Shapiro, 72 United States L. Rev. 444. (Ag. '38; New York City.)

It is fairly clear after reading this rather extensive article on only one phase of our national anti-trust legislation that there is nothing more certain than the uncertainty of it. What sort of legal cloth can be woven from the Hardwood, Linseed, Maple Flooring, Cement, and Sugar Institute cases? (1) A "sound" statistical reporting plan has social advantages "when exercised within" proper limits. (2) Statistical service "must be no more than a guide" on questions of production and selling price. (3) If it is a "cloak for an agreement or concerted action evidencing a wrongful purpose to control prices or limit production, it is condemned in its entirety." The decision in a case depends upon the facts as an aggregate but certain specific practices have received special consideration. (a) Secrecy in reporting data, and limitation of information to association members is a potent reason for condemning the plan. (b) Statistics must be compiled fairly and accurately or run a serious risk of condemnation. (c) The report should not be in detail beyond that necessary for intelligent knowledge of the industry. (d) Advice as to production or price policy by the association is apparently regarded as improper. (e) Commentators disagree whether reports of prices must be confined to past transactions or may include current prices and future quotations. The Sugar Institute case has shaken the former rule that forbade the latter type of report. (f) There must be no pressure to compel a number of an association to conform to group action. (g) An association must not supervise its members to the point of control. However illegality is not established by mere proof of "price leadership" and individual following of the prices. This practice is not unlawful unless it is the result of an agreement.

PRESUMPTIONS

What Shall The Trial Judge Tell The Jury About Presumptions? Charles T. McCormick, 13 Washington L. Rev. 185 (Jl. '38; Seattle, Wash.)

The complicated subject of presumptions seems to be another case where the learned "doctors" disagree. Formerly it appeared that the courts could obtain the "true" rules if they would only accept the analysis and the recommendations of Thayer, Wigmore and Chamberlayne. Now it appears that many judges have done that only to find that professors of a later period have presented views that diverge from Thayer and Wigmore. Thus, perhaps, the subject is more confused than ever. The Supreme Court of the United States in the recently decided *Gamer* case, having followed Thayer and Wigmore, is criticised; its "opinion is quite unsatisfying in its failure to deal with the body of recent scholarly opinion which supports the practice followed by the trial court" which was disapproved by the Supreme Court. The author has written clearly and briefly and makes an interesting distinction between most state courts, like Washington, where the trial courts are denied the privilege of commenting upon the evidence, and the national courts. It appears to be less difficult to accept the views of Thayer and Wigmore in the latter type of courts.

PRESUMPTIONS

Presumptions; Are They Evidence? J. P. McBaine, 26 California L. Rev. 519. (Jl. '38; Berkeley, Calif.)

The careful and cautious disposition of the author does not prevent very definite conclusions that are set forth at the end of his very extensive and comprehensive consideration of the title question. Taking issue with the Supreme Court of his own state, which represents the minority point of view, he asserts (1) "that legal rebuttable presumptions are not evidence," and (2) that courts ruling to the contrary are unfair to one litigant and are indulging in fallacious fiat. There is more of this that is strong language for lawyer-professor McBaine. The style is the type that lawyers will enjoy; no weaknesses of the subtle academician will mar the enjoyment. Incidentally, the author disagrees with part of the Thayer-Wigmore formula for presumptions. He joins Morgan of Harvard in moving away from the idea that a "rebuttable presumption is dispelled upon the introduction of testimony contrary to the fact presumed." Perhaps a partial motive for this is the belief that if presumptions were not "dispelled" it would be less difficult to persuade courts and legislatures that presumptions are not evidence.

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Notre Dame Lawyer, March (South Bend, Ind.)— Common of Piscary, by Jay W. Linsey and Robert B. Linsey; Jurisprudential Aims of Church Law Schools in the United States, A Survey, by Brendan F. Brown; Is the American Bar *Really* Overcrowded? by James Thomas Connor.

Oregon Law Review, February (Eugene, Ore.)—Assignment of Realty Mortgages in Oregon, by Claude H. Brown and William E. Dougherty; Why and How the Present Method of Amending the Federal Constitution Should be Changed, by Ernest C. Carman.

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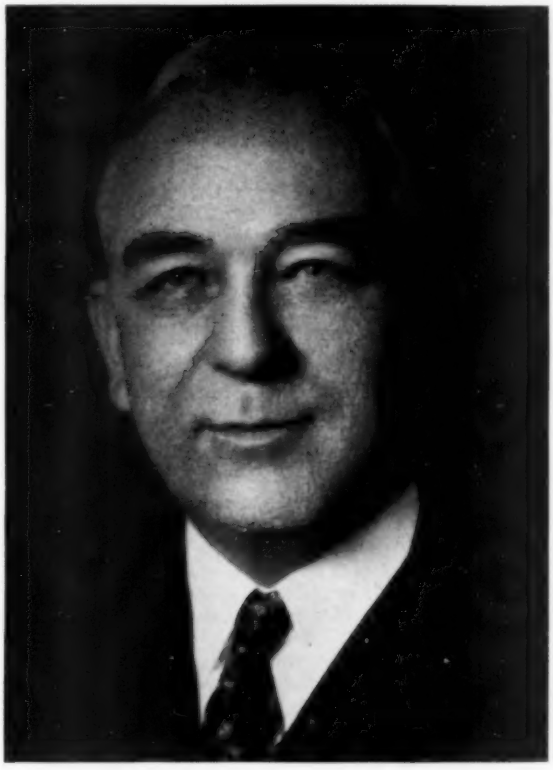

GILES J. PATTERSON

Chairman, Committee on Cooperation Between the Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings

North Carolina Law Review, April (Chapel Hill, N. C.)—Wrongful Death and Contributory Negligence, by Robert H. Wettach; Delegation of Powers To and Within Government Corporations, by Harvey Pinney; Social Security Encounters Common-Law Marriage in North Carolina, by James P. Lynch.

Notre Dame Lawyer, March (South Bend, Ind.)— Common of Piscary, by Jay W. Linsey and Robert B. Linsey; Jurisprudential Aims of Church Law Schools in the United States, A Survey, by Brendan F. Brown; Is the American Bar *Really* Overcrowded? by James Thomas Connor.

Oregon Law Review, February (Eugene, Ore.)—Assignment of Realty Mortgages in Oregon, by Claude H. Brown and William E. Dougherty; Why and How the Present Method of Amending the Federal Constitution Should be Changed, by Ernest C. Carman.

Oregon Law Review, April (Eugene, Ore.)—Recommendations for Statutory Uniformity in Relation to the Oregon Licensing Boards, by Orval Thompson; Blood Grouping Tests and Their Relationship to the Law, by Herbert B. Galton.

Oregon Law Review, June (Eugene, Ore.)—The Development of Industrial Conciliation and Arbitration Under Trade Agreements, by Thomas H. Tongue, III; The Criminal Liability of American Municipal Corporations, by James D. Barnett; The Application of the Law of Libel and Slander to Radio Broadcasting, by Frank E. Nash; Defamation by Radio: A New Tort, by Andrew J. Newhouse.

Pennsylvania Bar Association Quarterly, April (Philadelphia, Pa.)—"Stare Decisis" and Constitutional Law, by Stanley Reed; Hints on Bill Drafting, by John H. Fertig; An Analysis of the "Scire Facias" Act of 1929

and Its Amendments, by Sara M. Soffel; Uniformity in Procedural Rules, by George M. Neil.

University of Pennsylvania Law Review, April (Philadelphia, Pa.)—Debts Under Inflation, by Artur Nussbaum; Federal Income Tax: Further Comments on Reorganizations, by Homer Hendricks; Reasonable Search and Research, by John Barker Waite.

University of Pennsylvania Law Review, May (Philadelphia, Pa.)—Changing Conceptions of Property in Law. by Francis S. Philbrick; The Receptacle Cases in Sales, by George W. Bacon.

University of Pennsylvania Law Review, June (Philadelphia, Pa.)—Fair Trade Acts, by James Angell McLaughlin; The Family Watchdog, by John S. Bradway; The Doctrine of the Separation of Powers in Seventeenth Century Controversies, by Max Radin.

University of Pittsburgh Law Review, March (Pittsburgh, Pa.)—Comment on the Application of the Rule Against Perpetuities to the Duration of Private Trusts in Pennsylvania, by John A. Metz, Jr.; Adult Probation in Pennsylvania, by J. Warren Matson and Marjorie Hanson Matson.

University of Pittsburgh Law Review, June (Pittsburgh, Pa.)—Marital Status and Annulment in Pennsylvania, by J. John Lawler.

Rocky Mountain Law Review, February (Boulder, Colo.)—Irrigation Law in Colorado, by Wayne D. Williams; The Law, The Morse, and The Oriental, by William S. Bernard.

Rocky Mountain Law Review, April (Boulder, Colo.)—The Law, The Mores, and The Oriental, by William S. Bernard; Irrigation Law in Colorado: Part II, by Wayne D. Williams.

Southern California Law Review, March (Los Angeles, Cal.)—Oil Royalties—A Distinct Species of Property, by Adolph H. Levy; Double Domicile, by David Tannenbaum.

Temple Law Quarterly, April (Philadelphia, Pa.)—Judicial Delimitation of the Exemption of Federal Instrumentalities from State Taxation, by John G. Hervey; Our Federal Tax Predicament and What Can Be Done About it, by Ralph R. Neuhoff; Are Straw Men Worth Crowing About? by Frederick C. Fiechter, Jr.

Temple Law Quarterly, July (Philadelphia, Pa.)—Recent Decisions on the Power to Spend for the General Welfare, by Vincent D. Nicholson; Of Making Law Books, by Harold C. Roberts; Municipal Participation in Rural Electrification, by Israel Packel.

Southern California Law Review, June (Los Angeles, Cal.)—The Problem of Indemnity Insurance in Damage Actions as Answered by the Courts of California, by Henry F. Walker; Summary Judgment, by Hilton H. McCabe; California Low Rent Housing Legislation, by Samuel Taylor.

Tennessee Law Review, April (Knoxville, Tenn.)—Symposium on Higher Education in the South: A Survey of Legal Education in the South, by Herschell Whitfield Arant; Trends in Prelegal and Legal Education, by Arthur T. Vanderbilt; The Practitioner's View of Current Trends in Legal Education, by Henry Upson Sims; Some Thoughts on Law Teaching, by Forrest Andrews; Law Schools in Tennessee, by Walter P. Armstrong; A Lawyer Looks at a Lawyer's Training, by George H. Armistead, Jr.

Tennessee Law Review, June (Knoxville, Tenn.)—The TVA and the Comptroller General, by C. Herman Pritchett; Taxation in Tennessee, by George C. Anderson; Homicide and Self-Defense, by Howard H. Baker; The Federal Anti-Trust Law, by Henry E. Colton.

Texas Law Review, April (Austin, Texas)—Criminal Homicide in Texas, by George Wilfred Stumberg; Current Proposals for the Reorganization of the Federal Regulatory Agencies, by Ralph F. Fuchs.

Texas Law Review, June (Austin, Texas)—The Scope of Privilege in the Law of Evidence, by Charles T. McCormick; Conflicting Jurisdiction in the Appointment of Receivers, by R. Preston Shirley; Delegation of Power in Texas to Agencies Other Than State Administrative Bodies, by Joseph M. Ray; Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins, by Benno Schmidt; Jurisdiction of Supreme Court in Original Mandamus Involving Determination of Fact Controversy, by Lloyd E. Price.

Tulane Law Review, April (New Orleans, La.)—Civil Law Influences on the Development of Civil Liberties, by Eberhard P. Deutsch; A Law Teacher Looks Ahead, by H. W. Arant; The Implied Resolutory Condition for Non-Performance of a Contract, by Malcolm L. Monroe; The Comparative Aspects of Legal Terminology, by H. C. Gutteridge; Proposed Private Sale of Succession Assets, by Leon Sarpy.

Tulane Law Review, June (New Orleans, La.)—Expropriation of Petroleum Companies in Mexico, by Henry Paine Crawford; The Implied Resolutory Condition for Non-Performance of a Contract, by Malcolm L. Monroe; Legislative Trends in Colombia, by Richard C. Backus; Symposium on the Proposed Louisiana Mineral Code, by Sidney L. Herold, Dan Debaillon, Alden T. Shotwell, Allen Barksdale and George A. Dreyfous.

United States Law Review, February (New York City)—Federal Taxation—1938, by Roswell Magill; The Technic of the American Revolution, by O. G. Libby.

United States Law Review, March (New York City)—The Overcrowding of the Bar, by Francis Martin.

United States Law Review, April (New York City)—Should We Abolish the Statute of Frauds? by Robert E. Ireton; Law and the Changing Industrial Scene, by Leon R. Yankwich; The Jackie Coogan Case, by Harry Hibschman.

United States Law Review, May (New York City)—Fair and Effective Use of Present Antitrust Procedure, by Thurman Arnold.

JOHN S. BRADWAY
Chairman, Committee on Legal Aid Work

United States Law Review, June (New York City)—Trial by Torture, by I. Henry Kutz; The Mexican Expropriation of Oil Properties, by Roscoe B. Gaither; A Rounded System of Judicial Rule-Making, by Homer Cummings.

United States Law Review, July (New York City)—The Cooperation Clause in Liability Policies, by Seymour Joseph; Bureaucratic Innovations Affecting the Practice of the Law, by Isaac C. Donner.

United States Law Review, August (New York City)—Restatement of Property Rights in Ideas, by Sydney C. Schweitzer; Trade Association Reporting Under the Anti-Trust Laws, by Benjamin S. Kirsh and Harold Roland Shapiro.

Virginia Law Review, April (Charlottesville, Va.)—The Natural Law, Precedent, and Thurman Arnold, by Edward H. Levi; The Supreme Court as Arbiter between Congress and the States, by Alexander Lincoln.

Virginia Law Review, May (Charlottsville, Va.)—Virginia Notice of Motion Procedure, by Henry H. Fowler; Which Law Should Govern? by Edward S. Stimson.

Virginia Law Review, June (Charlottesville, Va.)—The Case of the Ladies' Handbags: A Study in Receivership Procedure, by Ferdinand Fairfax Stone; Which Law Should Govern? by Edward S. Stimson.

Washington University Law Quarterly, April (St. Louis, Mo.)—The Handmaid of Justice, by Charles E. Clark; Extra-Territorial Enforcement of Revenue Laws, by John L. Freeze.

Washington University Law Quarterly, June (St. Louis, Mo.)—Price Control by Government Competition in Anglo-American Federations, by Albert Salisbury Abel.

Washington Law Review, April (Seattle, Wash.)—Taxpayers' Remedies—Washington Property Taxes, by Breck P. McAllister; Comments—Payment of the Liquidated Portion of a Debt as Consideration for the Discharge of the Entire Claim, by William Goucher.

Washington Law Review, July (Seattle, Wash.)—What Shall the Trial Judge Tell the Jury About Presumptions? by Charles T. McCormick; The New Federal Rules of Civil Procedure, by Elwood Hutcheson; The Doctrine of Res Ipsa Loquitur in Washington, by Max Kaminoff.

Wisconsin Law Review, March (Madison, Wis.)—Wisconsin's New "Personal Receivership" Law, by Lloyd K. Garrison; The Wisconsin Labor Relations Act in 1937, by William Gorham Rice, Jr.; The Proposed Court of Administrative Appeals, by Alvin C. Reis; The Rule of Law: A Revaluation, by William Ebenstein.

Wisconsin Law Review, May (Madison, Wis.)—Contribution Among Tortfeasors: A Uniform Practice, by Charles O. Gregory; Duty, Fault, and Legal Cause, by Richard V. Campbell; A Re-Examination of the Basis for Liability for Emotional Distress, by Fowler V. Harper and Mary Coate McNeely; Comparative Negligence, by Thomas P. Whelan.

Wisconsin Law Review, July (Madison, Wis.)—The English System of Legal Education, by Carl Elbridge Newton; Legal Education in the Soviet Union, by John N. Hazard.

The Yale Law Journal, March (New Haven, Conn.)—The Shadow World of Thurman Arnold, by Max Lerner; Last Clear Chance: A Transitional Doctrine, by Fleming James, Jr.; The Politics of Fiscal Policy, by E. Pendleton Herring.

Yale Law Journal, April (New Haven, Conn.)—Forged Indorsements, by Friedrich Kessler; Federal Intervention II. The Procedure, Status, and Federal Jurisdictional Requirements, by Edward H. Levi and James Wm. Moore.

Yale Law Journal, May (New Haven, Conn.)—The Supreme Court and Private Rights, by Edwin Borchard; Employment of Corporate Executives by Majority Stockholders, by John F. Meck, Jr.; Four Letters of Mr. Justice Field, Edited by Howard Jay Graham; The Government and Its Employes, by Carol Agger.

Yale Law Journal, June (New Haven, Conn.)—The Rule of Law in our Case—Law of Contracts, by K. N. Llewellyn; The Lawyer and the Public: An A. A. L. S. Survey, by Charles E. Clark and Emma Corstvet; Fair and Effective Use of Present Antitrust Procedure, by Thurman Arnold; Unfair Competition by Truthful Disparagement, by John Wolff.

GEORGE E. BEERS
Chairman, Section of Real Property, Probate and Trust Law

London Letter

(*Continued from page* 914)

or, if so disposed, smoke a cigarette. The room has, from time to time, been used as a Court, but in 1914 the Bar appealed to Lord Haldine then Lord Chancellor, who decided that it should be used for its original purpose. Latterly, however, it has again been in use as a Court, to the great inconvenience of the Bar as a whole. Whether other arrangements will be made for the comfort and convenience of barristers, after the vacation, remains to be seen. The Law Courts in London were erected from designs by G. E. Street who died before the work was completed. Sir A. Blomfield and A. E. Street finished it. The foundations were laid in 1874 and the building cost £1,1,000,000. In addition, the purchase and clearance of the site cost £1,500,000. The proposed additions are estimated to cost £44,000.

Honorary Bencher of Lincoln's Inn

Professor Arthur Lehman Goodhart, M. A., LL. M., LL. D., D. C. L., who is as well known in the United States as in England, has been elected an Honorary Bencher of the Honorable Society of Lin-

coln's Inn. He was born in New York City on the 1st March, 1891, and was educated at Hotchkiss School, Yale University, and Trinity College, Cambridge. During the years 1915-17, he was Assistant Corporation Counsel for New York City, and was a Captain in the U. S. A. Ordinance from 1917-1919. From 1919 to 1931 he was University Lecturer in Law at Cambridge. He was editor of the Cambridge Law Journal from 1921 to 1925, and has edited the Law Quarterly Review since 1926, in which work he followed the Rt. Hon. Sir Frederick Pollock. Professor Goodhart was called to the Bar at the Inner Temple on the 14th May, 1919, and was recently admitted to the Middle Temple *ad eundem*.

Obituary

In the April "London Letter" reference was made to the publication of the second edition of the Middle Temple Bench Book, which had been edited by J. Bruce Williamson, a Master of the Bench of that Inn. This great historian of the Temple died on the 7th July last in his 80th year. His great work on "The Temple, London" and his many other contributions to the history of the Middle Temple are lasting monuments to his learning, and it is safe to say that his researches into the Records have contributed more to our knowledge of the Temple than those of anyone since Dugdale compiled his "Origines Juridiciales."

The Middle Temple has suffered a further loss by the death of the late Mr. Justice Horridge, who was called to the Bar at that Inn in 1884, after having been a solicitor. Sir Thomas Gardner Horridge was born in 1857, and educated at Nassau School, Barnes. He became a King's Counsel in 1901 and was made a Judge of the High Court in 1910, from which office he retired in 1937. He was then the oldest judge on the High Court Bench. The conscientious manner in which he applied himself to his judicial duties was obvious, but his most striking success was in politics and not in law, when in 1906, he defeated the ex-Prime Minister Mr. A. J. Balfour (later Lord Balfour) in the election at East Manchester, by nearly 2,000 votes. He remained in Parliament till 1910. He was Treasurer of the Middle Temple in 1929, and was made a Privy Councillor in 1937.

The Rt. Hon. Sir George Talbot, who died on the 11th July last, was for fourteen years a judge of the King's Bench Division of the High Court, from which he retired in 1937. He was born on the 19th June, 1861 and educated at Winchester and Christ Church, Oxford, and elected a Fellow of All Souls College in 1886. Called to the Bar by the Inner Temple in 1887, he became King's Counsel in 1906. He was made a Bencher of his Inn in 1914 and served as Treasurer in 1936.

Defalcations by Solicitors

The Law Society held its Annual General Meeting on the 8th July last, and, the business of the meeting being concluded, the chairman and retiring President, Sir Francis E. J. Smith, made a statement of the steps which the Council had decided to take to prevent defalcations by Solicitors. He noted that, on the 1st June, 1938, there were 16,747 practising solicitors, of whom 11,133 were members of the Law Society, and that the number of solicitors struck off the Roll during the last ten years was 203. In describing the relationship of the Society to members and non-members he said that the Society is a voluntary association acting under a charter of incorporation. It acts as registrar for all solicitors, whether members or not. It is entrusted with the education and examination of articled clerks, and it has power to make rules, subject to the approval of the Master of the Rolls, for the discipline of the whole body of solicitors. Under those rules it also has power to inspect their accounts, but its power of enforcement of rules is confined to making an application to the Disciplinary Committee, which is not a Committee of the Council, but a statutory body entrusted by Parliament with the power of striking solicitors off the Rolls, suspending, fining, or otherwise dealing with them in respect of any mal-practices alleged against them. From the findings and order of the Disciplinary Committee there exists an appeal to the Divisional Court, and it is a noticeable fact that in only one instance since 1919 has the Court interfered with a sentence passed by the Disciplinary Committee.

The subject of defalcation by solicitors has been considered by the Council of the Law Society on many occasions and reported upon by special committees in 1900, 1906, 1928, 1929 and 1931. Many suggestions were dealt with by these committees for remedying the evils resulting from defalcations, and these suggestions were classified by the President as either "prevention" or "cure." Measures for "prevention" in the main fell under one or other of the following headings —compulsory audit of accounts; compulsory membership of the Law Society; rules for the keeping of proper accounts and for the paying of all clients' moneys into a separate banking account. Suggestions which have been made for the "cure" of the evils resulting from defalcations have centered round either a relief fund available for necessitous cases or some form of guarantee or insurance against losses by defalcations.

The Solicitors Accounts Rules, 1935, made under the Solicitors Act, 1933, prodine that solicitors shall keep their clients' moneys distinct from their own moneys and shall keep proper books of account to distinguish those two sets of moneys, and that the Council shall have power to inspect solicitors' accounts in order to see whether they have complied with the Rules. Such inspections are now in progress and, out of eighteen cases heard by the Disciplinary Committee, seventeen have resulted in the solicitor concerned being struck off the Rolls. The Council are of opinion that the best way to deal with the subject of defalcation is to take more effective and prompter action where cases of possible future default are reported, and to exercise greater control over the issue of practicing certificates. It may be here noted that a solicitor after admission, cannot practice without taking out an annual stamped certificate in accordance with section 43 of the Solicitors Act, 1932. The Council have accordingly decided to create a permanent legal department of the Law Society under the control of a solicitor in the whole-time employe of the Society to undertake all disciplinary work and the necessary preliminary investigations. Also to employ on the Society's staff an accountant who can carry out, more speedily and with a greater degree of uniformity, inspections under the Accounts Rules. It is believed that these innovations will result in the disciplinary work being expedited and its general efficiency increased, as well as a considerable saving of expense to the Society.

The President went on to state that it is proposed to promote legislation to provide that every solicitor on applying for his annual practising certificate shall be

required personally to make a declaration that to the best of his knowledge and belief he has complied with the Accounts Rules, and such Rules shall be printed in full on the form of declaration or on the back thereof. Legislation is also to be promoted to empower the Council to refuse to issue a practising certificate in certain cases additional to those in which they already have that power, and instead of refusing to issue a certificate, to issue a certificate only subject to such terms or conditions as the Council, in their discretion, may think fit. The existing cases where a certificate may be refused are where a solicitor is an undischarged bankrupt or a lunatic, or first applies after being restored to the Roll or suspended from practice, or where he has not taken out a practising certificate within one year of admission or has allowed his certificate to lapse for at least a year. Provincial Law Societies are invited to report any case in which they may believe or suspect that a solicitor may be in financial difficulties or may not have complied with the Account Rules. It is intended to amend the Solicitors Accounts Rules so as to make failure to produce accounts at the place and on the date fixed a more serious and certain offence and to prevent the frivolous objections, excuses and evasions which it has become the practice to make on almost every occasion that a solicitor is required to produce his accounts under the Rules.

Legislation will also be promoted to provide that adjudication in bankruptcy of any solicitor shall operate immediately to suspend his practising certificate; to empower the Council at their discretion to refuse to permit a solicitor to take an articled clerk in any case in which the Council have a discretion to refuse to issue a practising certificate to such solicitor; and to empower the Council to prohibit a solicitor from employing, without their permission, an unadmitted clerk who may have been found by the Disciplinary Committee to have been party to the misconduct of a solicitor whose name has been struck off the Rolls or who has been suspended from practice, fined or censured by the Disciplinary Committee. The Council consider this last measure desirable, because it is within their knowledge that in a number of cases an unqualified clerk has been in the office of successive solicitors, each of whom has been struck off the Rolls by the Disciplinary Committee for defaults of the clerk, in circumstances which lead to the conclusion that the clerk was in the effective control of the practice.

S.

The Temple.

A Vital and Far-Reaching Movement

"One movement that has definitely gotten under way this year has interested me deeply. Several local bar associations with the cooperation and assistance of the American Bar Association have initiated advanced courses for lawyers. These courses have covered a wide field of interests from lectures on contracts, trusts and wills to some on the newer types of legislation, e.g., the Robinson-Patman Act, the Wagner Act and 77B of the Bankruptcy Act. In some centers practice courses for young lawyers (but attended also by some who are no longer young) have been established and are reported to be doing well. This movement promises to be one of the most vital and far-reaching ones ever undertaken by the American bar. It is distinctly a bar program, though law teachers are frequently invited to serve as lecturers."—*From Letter to the Law Alumni of the University of Illinois, by Dean Albert J. Harno.*

Current Events

(*Continued from page 872*)

tion of living victims. The questionnaire to lawyers who practice before the incumbent judges yields sharp contrasts. Each judge is rated on his industry, legal knowledge and ability, impartiality, Court-room manners, and the like. One judge gets a mark of 36.1 per cent and should not be re-elected, whereas Judge John J. Rooney gets 90.4, "has made a commendable record for twenty-four years, is well qualified and should be re-elected."

This year's report as recently transmitted by the Board of Managers to the members of the Association relates to the candidates for County Judge, for Probate Judge and Associate Judges of the Municipal Court of Chicago who will be voted on at the election on November 8, 1938. The results of the questionnaire on County Judge, Probate Judge and Associate Judges of the Municipal Court whose terms of office expire in 1938, will be of general interest:

	Percentage using formula set out below	Should he be re-nominated? Yes	No
County Judge			
Edmund K. Jarecki.	83.4	992	275
Probate Judge			
John F. O'Connell..	80.8	1031	360
Associate Judges of Municipal Court			
Edward B. Casey...	92.4	1086	113
Samuel Heller	91.4	995	139
John Gutknecht	90.6	951	157
John J. Rooney.....	90.4	987	136
Lambert K. Hayes..	90.2	747	103
Cecil C. Smith.....	84.7	767	177
Samuel H. Trude...	69.2	619	501
Joseph H. McGarry.	66.8	535	373
Michael G. Kasper..	58.9	398	409
Eugene J. Holland.	47.3	372	571
N. J. Bonelli	36.1	237	684

The formula upon which the above-stated percentages were computed from the responses to the Committee's questionnaire is as follows:

Does he [the incumbent judge] observe Court hours?.....	5
Is he diligent in the dispatch of business?	5
Is he patient and courteous?.....	5
Is he attentive and fair minded?....	5
Does he possess legal ability?.....	20
Have you confidence in his integrity?	40
Do you regard him as an able judge?	20

Questionnaires received	1553	
Questionnaires returned with no vote	10	
Questionnaires rejected for failure to comply with rules.....	26	36
Questionnairies counted	1517	

Needless to say, the results of the questionnaire and the application of the formula, in so far as concerns the propriety of re-nominating the sitting judge, does not in all instances control or forecast the outcome of the Bar primary, in which the lawyers express their choice and recommendation as between opposing candidates.

Results of Bar Primary

Endorsement of candidates by the Association can be given only by vote of the members in the bar primary. The prior questionnaire and report of the Committee on Candidates are only advisory to the members in voting. The result of the recent primary was as follows, the names of candidates endorsed being printed in capital letters, the parties by which they were nominated are indicated by abbreviation:

FOR JUDGE OF THE COUNTY COURT

THEODORE F. EHLER (Rep.)..1346
Edmund K. Jarecki (Dem.)..... 730

FOR JUDGE OF THE PROBATE COURT

JOHN F. O'CONNELL (Dem.)..1207
Robert W. Dunn (Rep.)..... 881

FOR ASSOCIATE JUDGES OF THE MUNCIPAL COURT

JOHN F. HAAS (Rep.).....1906
EDWARD B. CASEY (Rep.)....1834
SAMUEL HELLER (Rep.).....1676
JOHN J. ROONEY (Dem.).....1675
LAMBERT K. HAYES (Dem.)..1581
CECIL CORBETT SMITH (Dem.) 1575
JOHN GUTKNECHT (Dem.)...1412
EDWARD A. FISHER (Rep.)..1216
HARRY F. HAMLIN (Rep.)....1194
WILLIAM L. MORGAN (Rep.). 996
EDWARD CHAYES (Rep.).... 962
SAMUEL H. TRUDE (Rep.).... 942
Joseph H. McGarry (Dem.)..... 872
Mary Berkemeier Quinn (Rep.)... 864
William V. Daly (Dem.)..... 740
Albert B. George (Rep.)..... 543
Frank E. Donoghue (Dem.)..... 385
Eugene J. Holland (Dem.)..... 353
Michael G. Kasper (Dem.)..... 315
Mason S. Sullivan (Dem.)..... 250
N. J. Bonelli (Dem.)..... 229
Victor A. Kula (Dem.)..... 214
John H. Lyle (Rep.)..... 153
William F. Cooper (Rep.)..... 99

The results show that the action of the Association is non-partisan and based upon the members' estimates of the qualifications of the candidates as individuals irrespective of their party affiliations.

Washington Letter

Certioraris Granted and Denied

Three cases arising through the National Labor Relations Board were accepted for consideration by the Supreme Court at its opening session. One of them is where the Ford Motor Company questions the right of the Board to withdraw an order it had made and thus reopen the case. The Circuit Court, at Covington, Kentucky, ruled that the Board could withdraw the order. The Board sought to do this after the indication by the Supreme Court, in the Kansas City stockyards case, that the procedure which the Board had followed might not constitute due process of law. Last spring, the Supreme Court permitted the Board to withdraw an order in the Republic Steel Corporation case, but therein no transcript of the Board's proceedings had been filed in the Circuit Court which was to review the case, whereas such a transcript, in the Ford case, had been filed by the Labor Board in the Circuit Court of Appeals.

A second labor case in which certiorari was granted was that of the Columbian Enameling and Stamping Company, of Terre Haute, Indiana. The Circuit Court ruled that since the strike violated a contract, the strikers ceased to be employees within the purview of the Wagner Labor Relations Act, and hence the Board had no power to order the strikers reinstated. The Board had held that the Company's refusal to bargain after the strike was an unfair labor practice and accordingly ordered reinstatement of 250 strikers. In petitioning certiorari, the Labor Board contended that the question is one of great importance as to whether misconduct by employees exempts employers from the provisions of the National Labor Relations Act. The Circuit Court held that the Company had engaged in "an open, defiant flouting of the law," but that, nevertheless, the employees, by reason of their own actions, were barred from obtaining relief under the Wagner Act.

Third in the list of Labor Board cases to be reviewed is that of the Sands Manufacturing Company, of Cleveland, makers of gas and kerosene water heaters. Here the Board ordered reinstatement of 48 employees after it had cited the company for failure to resume collective bargaining with the Mechanics' Educational Society of America when there appeared to be a fair possibility of an agreement being reached; for offering reinstatement to employees on condition that they join a union which did not have a closed shop contract; and for denying reinstatement because of membership in a particular union. The Circuit Court ruled that the comany had sincerely endeavored, over a long period, to negotiate differences with the union and had suspended such negotiations only after that organization had taken action "which in effect was equivalent to a strike."

Among the other petitions for certiorari granted was that of Lloyd L.

Gaines, negro, of St. Louis, contesting his exclusion from the School of Law of the University of Missouri, on account of race. The Supreme Court of Missouri upheld his exclusion, thus sustaining the contention that equal opportunity was offered colored students at Lincoln University, which also is a State school.

The petition of Thomas J. Mooney was denied. Twice before the Supreme Court had declined to consider his case, in 1917 and again in 1935. At the latter time it was held that he had not exhausted his legal rights in the California courts. Thereafter the State Supreme Court ruled against him 5 to 1. He originally was sentenced to death for complicity in the 1916 Preparedness Day parade bombing which resulted in the death of 10 persons; but his sentence was modified to life imprisonment at the instance of President Woodrow Wilson. Among Mooney's contentions are that he was convicted on perjured testimony and that the California officials deliberately withheld evidence indicating he was innocent. His counsel have, however, obtained permission of Chief Justice Hughes to file papers within 20 days seeking to bring an original habeas corpus action in the Supreme Court. Such a hearing might result in the Court's hearing his case on the issues even after its denial of his certiorari petition.

Another petition denied was that of the National Conference on Legalizing Lotteries, Inc., wherein it sought review of an order by Postmaster General Farley denying it the use of the mails. The United States Court of Appeals for the District of Columbia had upheld the Department's ruling that this organization was "engaged in conducting a scheme for the distribution of money * * * by lot or chance." The president of the organization, Mrs. Oliver Harriman, of New York, contended that it was legitimate, having been formed to urge legalization of lotteries for worthy American charities and public purposes, subject to Government license and supervision.

Monopoly Committee Hearings

The Temporary National Economic Committee has planned tentatively to commence its public hearings November 14th or 15th. The first subjects for attention are expected to be the proxy contest in the Chesapeake and Ohio Railway Company and the concentrated ownership of glass patents, in which matters 89 subpoenas already have been issued. The tone and some of the trends of this Committee may be indicated by recent remarks of its Chairman, Senator Joseph C. O'Mahoney. At a recent meeting of the New York Board of Trade he said:

"Concentration of economic power and wealth in government can be just as bad if not worse than if concentrated in a large corporation. Concentration in government would be the ultimate concentration beyond which there could be no more. If there is any danger of that it is because of the tremendous extent to which concentration has already progressed through the corporate device."

"That the corporations in which management has been divorced from ownership are altogether dissimilar from the corporation which is owned and managed by the same persons is a fact which has only recently been sinking into the public consciousness. There is a growing comprehension on the part of business that the vast industrial and commercial organizations can no longer be treated as though they were private persons."

The Executive Committee has been authorized to prepare a written report on procedure for the conduct of hearings and to report to the full Committee the particular subjects to be covered in open hearings.

Chairman O'Mahoney, in looking toward the Committee's future, said, "It is of the utmost importance to the country that we have some general formula for the solution of our problem. A thorough, detailed study would take years to accomplish. To a Bureau of Industrial Economics might be given the continuance of such a study as we are beginning. It's called a Temporary Committee, isn't it?"

To Amend or Not to Amend the Wagner Act

Most guesses in Washington are that the coming session of Congress will amend the National Labor Relations Act. That may be because nearly everybody wants it amended. But what the amendments may be is dangerous ground for any careful speculator to tread, for there are approximately as many sets of amendments as there are organizations interested in this legislation. The American Federation of Labor suggests the following amendments:

1. The unit rule must be changed to conform to that which is in the Railway Labor Act so that it will be obligatory on the Board to grant a class or craft the right to select its bargaining representative by majority vote.

2. The power of the Board to invalidate contracts must be definitely curtailed.

3. Every known interested party should be served with due process and be afforded an opportunity to appear in any case. No contractual rights should be passed upon without every party to the contract being served with process and given the right to appear in the case.

4. Intervention by interested parties should be made a matter of right and not a matter of discretion.

5. Definite qualifications should be set forth in respect to examiners. Some are wholly incompetent and unfit to serve in that capacity. In fact, affidavits of prejudice should be permitted to be filed against them where an examiner is considered unfair.

6. Clarification respecting powers over the issuance of subpoenas is necessary and liberalizing of the rule in that respect should be provided.

7. The secrecy of files must be lifted to the extent that all persons may have an opportunity to examine a record which contains material on which decisions are made.

8. Elections shall be conducted within thirty days from filing of a petition therefor.

9. All cases shall be decided within 45 days after the close of the taking of testimony.

The National Association of Manufacturers makes it clear that it is not suggesting an era of unrestricted warfare or that employers be licensed to use any devices they see fit to combat strikes or the organization efforts of labor. The following is their outline for amending the Act:

1. The function of government, as declared by President Roosevelt in settling the automobile strike in March, 1934, should be only that of assuring that employees shall not be subject to coercion from any source. The National Labor Relations Act and similar state acts should be amended accordingly.

2. The National Labor Relations Act, and similar state acts, should be amended so that no employer could be penalized for failure to deal with any labor organization, organizing, supporting, or maintaining strikes of the following character among its employees:

(a) without presentation of demands or grievances and reasonable opportunity for their consideration;

(b) in violation of employment agreements, including agreements to accept an arbitration award;

(c) to compel establishment of the check-off, or to prevent, compel or terminate the employment of any person because he is or is not a member of any organization;

(d) to prevent the use of materials, equipment or services;

(e) to compel an employer to deal collectively with certain types of supervisory officials;

(f) when accompanied by continuous

and systematic acts of violence and intimidation;

(g) sit-down strikes, or any other strikes which involve illegal occupation of the property of others;

(h) general strikes or strikes not in support of those in similar positions in other plants in the same industry;

(i) to cause the commission of an illegal act or the omission of a legal duty.

3. The definition of "strikers" as "employees," under the National Labor Relations Act, or any similar act, should be amended to distinguish between legal and illegal strikes, persons engaging in the latter (see paragraph 2 above) not being eligible to participate in elections, to select representatives, or to be reinstated by order of the Board.

The attitude of the Committee for Industrial Organization on amending the Act is expressed in a recent statement by its National Director, John Brophy, contradicting a story which had come out to the effect that the C. I. O. was withdrawing its opposition to "moderate" amendment of the Wagner Act. His statement said:

1. The Committee for Industrial Organization is opposed to all moves to amend the Wagner Act, in whatever fashion. Any rumors to the contrary are without any foundation in fact.

2. The C. I. O. is utilizing all its channels of publicity to make its membership and friends aware of the dangers to labor involved in any changes to an Act which has truly proved itself the charter of labor's collective bargaining rights.

Tax-Exempt Bonds

In last month's Washington Letter to the JOURNAL there was described a study made by the Department of Justice of the legal aspects of taxing the income from Government bonds heretofore considered to have been tax-exempt. There now has come from a different source a study of the amounts of such bonds, both federal and local and by whom they are held, with the apparent idea of providing a basis or starting point for determining the amount of tax which might be produced if the proceeds of such bonds should be freely taxed. This latter study is entitled "Securities Exempt from the Federal Income Tax as of June 30, 1937" and was prepared by the Treasury Department, Division of Research and Statistics, in cooperation with the Bureau of the Census. This mimeographed treatise contains 113 pages, including numerous tables and summaries, and is more difficult to obtain than the other study referred to. So far as known there is no place where it is available for public distribution.

Letters of Interest

"Lagging Behind the Present Age"

Editor, AMERICAN BAR ASSOCIATION JOURNAL:

The August number of the JOURNAL is even more thought-provoking than the average issue. The high sense of social responsibility of the bar is presented in almost every address and paper. Among this, however, may be noted two instances of definite lagging behind the present age.

I allude to the attitude apparently of some courts toward women. The Washington letter treats somewhat facetiously the denial of citizenship of the USA to a woman who would not swear positively whether she would bear arms for the US. We have long given patriotic canonization to Molly Pitcher and perhaps other women who took actual part in battle, but it seems another thing to oblige a woman to swear that she will bear arms in war or she may not become a citizen.

Another instance (24 JOUR. ABA 667) reports that the State Board of Law Examiners of my native state (Pennsylvania) brushed aside the request for recognition of a woman as herself, and insisted on dragging in her husband when they issued a certificate in the name of Marjorie Hanson, now Marjorie Matson. And the supreme court apparently sympathized with the view that a male lawyer's marital status has nothing to do with his profession, name or duties, but if a woman wins standing so as to become a lawyer, the name she has always borne will not do for service, but the name of her husband has to be tacked on. (Appeal of Hanson, 98 At. 113.)

If the legal profession wishes to be abreast of the time, if its members hope to have public respect as the tolerant group that most articles in this very issue of the magazine claim the bar to be, there should be no harking back to the forms of canceling out the female from every human couple so as to make instead one man and one zero.

J. C. RUPPENTHAL.

Russell, Kan.,

EDITOR AMERICAN BAR ASSOCIATION JOURNAL:

As a member of the American Bar Association and a recipient of the JOURNAL, the list of legal periodicals together with the list of the subject covered by each periodical has been of great interest to me. Each month I go over the list of articles and if I find anything that touches upon matters that I am interested in I send for a copy of the Law Journal, and subsequently have the articles bound into book form. At the present time I have 10 volumes. These articles have been a great help to me in my practice.

Recently I have missed the list of these periodicals and I am writing to ask if they have been discontinued. If so, would you direct me to a place where I could find such a summary as you have been publishing?

Thanking you in advance, I am,

Yours very truly,

JAMES H. HAYES.

New York City, August 10.

EDITORIAL NOTE: The department of Legal Periodicals is found elsewhere in this issue. Its temporary suspension was due to the demand for space ensuing from the annual meeting.

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

I am one of hundreds of men who were not able to attend the American Bar Association at Cleveland, but have the privilege of reading the report of the same in the September number of the JOURNAL.

I want to congratulate you and the others who published the JOURNAL on the high class of the work done by you and them. Vol. XXIV, No. 9, is a prize to be preserved by every lawyer who reads it.

The members of the Aroostook Bar Association join me in sending you these words of praise.

RANSFORD W. SHAW

President, Aroostook Bar Association.

Houlton, Maine,

EDITORIAL COMMENT

The Bar Looks at Civil Rights

(From the Norfolk Virginia-Pilot)

Frank J. Hogan's first act on becoming president of the American Bar Association was to propose the creation of a committee on defense of civil liberties accepted by the association.

This does not mean, in Mr. Hogan's words, that the association "would intervene in or concern itself with every case in which a citizen claimed that his rights under the Bill of Rights were denied or endangered. Substantial and selected cases would have to be canvassed and taken up. The public would, I believe, welcome and heed the investigation, findings, and actions taken by an impartial and representative body, in full co-operation with the orderly administration of Justice."

To such high words the only possible

response is an hearty "Amen!" It would be difficult for any organization to lay too much stress on the defense of civil liberties. When a powerful body like the American Bar Association undertakes such responsibilities, the country can rejoice in fresh strength for a vitally important cause—provided only that the fresh strength is applied to the whole broad problem and not to segments of it. On that subject Mr. Hogan had something else to say. We quote:

"Perhaps, because the trampling recently sometimes has been upon well-worn shoes, the hurt done thereby has been considered more important than when the crushed toes were encased in patent leather footwear of the wealthy, or the rights denied or the privacy invaded were those of the business corporation. It may come to be considered, as it should be, that violations of the Bill of Rights are intolerable, no matter whom they affect."

Here is the danger against which Mr. Hogan and his committee will have to guard. They start with the handicap that lies in the public's knowledge of where and by whom the best known members of the American Bar Association have frequently, if not generally, been employed. To overcome this handicap they will have to demonstrate that in this admirable endeavor they are as jealous in conserving the protection of the Bill of Rights to those whom they seldom represent as they are in invoking this charter for the benefit of those whom they represent often.

News of the Bar Associations

Alabama Association Meets on Historic Site — Judge Parker's Address on "Democracy and Constitutional Government" Features Annual Dinner — Unauthorized Practice Condemned

C. H. YOUNG
President, Alabama State Bar Association

THE Sixty-first Annual Meeting of the Alabama State Bar Association was held at Mobile, Alabama, on July 8 and 9, 1938. All sessions of the meeting were held in the auditorium of the Battle House, historic site of General Andrew Jackson's headquarters in 1816. The meeting was characterized by large and representative attendance of attorneys from all parts of the State, and great interest and enthusiasm were exhibited.

After the Association was called to order by the President, the invocation was given by Dr. John W. Frazer of Mobile. This was followed by an address of welcome by William G. Caffey, President of the Mobile Bar Association, to which response was made by White E. Gibson, Sr., of the Birmingham Bar.

Interesting Addresses Delivered

The following addresses were delivered during succeeding sessions of the meeting:

"Making Administrative Action Safe," by Dr. J. V. Masters of the Law Department of the University of Alabama.

"Lawyers and the Railroads," by E. S. Jouett, Vice-president and General Counsel, Louisville and Nashville Railroad Company.

"We Are Members of a Profession," by E. Smythe Gambrell of the Atlanta, Georgia, Bar.

"The American Bar and Membership Standards for Admission," by Dean Paul Brosman of the Tulane University College of Law.

"Democracy and Constitutional Government," by Hon. John J. Parker, Judge, United States Circuit Court of Appeals, Fourth Circuit.

"Relation of Court Reporters to the Bar," by D. M. Carr, President, Alabama Court Reporter's Association.

Judge Parker's Address Feature of Annual Dinner

Judge Parker's address featured the annual dinner of the Association at the Mobile Country Club. With great clarity and sincerity, but with appropriate judicial restraint, the speaker discussed the problem of "preserving the fundamental principles of our constitutional structure and applying them intelligently to the changed conditions of the age in which we are living."

The retiring President, Hon. Lawrence F. Gerald, delivered a comprehensive report of the activities of the Association and its Board of Commissioners during the past year, particularly with regard to purging the Association of unethical practitioners. He also pointed to progress in dealing with the problem of unauthorized practice of the law, and declared that the question of legal aid was a matter of increasing concern and consideration to our profession.

The Association went strongly on record as condemning the widespread evils of unauthorized practice of the law and voted to send a delegate to the Annual Meeting of the American Bar Association with specific instructions to cooperate with the agencies of the American Bar Association toward the suppression of such evils.

Hon. C. H. Young, of Anniston, Alabama, was elected President of the Association for the year 1938-1939.

The Alabama Association of Circuit Judges, Alabama Circuit Solicitors' Association, and the Junior Bar Section of the Association, held their respective annual meetings concurrently with the Alabama State Bar Association, and contributed much to the occasion.

The Mobile Bar Association presented a varied program of entertainment in keeping with the city's reputation for gracious hospitality. Immediately following adjournment, the visiting lawyers and their friends embarked on a seven hour sight-seeing cruise down Mobile Bay, supper being served to several hundred members of the Association on the boat.

HAROLD M. COOK,
Secretary

Montana Bar Association Adopts Constructive Program—Integrated Bar and Raising of Admission Standards Approved—President Hogan, Senator Wheeler and State Bar Presidents Brand and Van Cott Speak

THE Fifty-second Annual Meeting of the Montana Bar Association was held at the Rainbow Hotel at Great Falls on September 2 and 3, 1938. This convention was the largest one from the point of attendance in the history of the Association, approximately 250 registering for the convention.

The convention was called to order on the morning of September 2, by Julius J. Wuerthner, President of the Montana Bar Association, and also Mayor of the City of Great Falls, the host city. The Address of Welcome was delivered by J. W. Speer, former President of the Montana Bar Association, and former Mayor of Great Falls, and the Response was delivered by Arthur F. Lamey, of Havre.

The President of the Association then delivered the President's Annual Address. He recommended that the requirements for admission to practice law in Montana be raised. He urged greater cooperation with the American Bar Association and urged a greater campaign for membership from the State of Montana. He strongly recommended the Integrated bar for Montana and stated that this should be accomplished during the next year.

An address was given by A. H. Gray of Great Falls, Referee in Bankruptcy, on "The New Bankruptcy Law." State Senator Arlie M. Poor, of Wolf Point, President of the Northeastern Montana Bar Association, then spoke on "The District Organization," setting forth the need of such a district organization and pointing out the efforts and accomplishments of the same.

The convention then adjourned to the Fox Liberty Theatre for a showing of two Law Film Classics, one a lecture by Professor John Henry Wigmore on "Rationale of Evidence" and Professor Samuel Williston on "Consideration."

The afternoon session opened with a report on the recent session of the House of Delegates of the American Bar Association, by W. J. Jameson, of Billings, former President of the Montana Bar Association, and a member of the House of Delegates from Montana.

The Hon. B. K. Wheeler, Senior United States Senator from Montana then addressed the Association, giving an able and interesting discussion and report on the happenings in connection with the recent attempt to pack the Supreme Court.

Another outstanding talk was given by the Hon. George E. Brand, of Detroit, Michigan, President of the Michigan Bar Association, and an outstanding authority on the subject chosen, "The Integrated Bar." Mr. Brand explained in detail the working of the integrated bar, its purposes and necessity.

The Annual banquet was held on Friday afternoon at the Rainbow Hotel, the Hon. Lew L. Callaway of Helena, former Chief Justice of the Supreme Court. of Montana, presiding. Speakers on the program included Chief Justice, O. F. Goddard of Billings, the Hon. Hugh Adair, of Helena, Lieutenant Governor of Montana, Major W. H. Drane Lester, Assistant Director of the Federal Bureau of Investigation of Washington, D. C., the Hon. B. K. Wheeler and the Hon. George E. Brand.

On Saturday morning, September 3rd, a breakfast was held starting at 8:00 A. M. in the Rainbow Hotel. The Hon. George Y. Patten of Bozeman, presiding. The feature of the breakfast program was an address by Hon. W. Q. VanCott of Salt Lake City, President of the Utah Bar Association, who discussed and explained "New Rules for Civil Causes in District Courts of the United States."

Major W. H. Drane Lester of Washington, D. C., assistant to J. Edgar Hoover of the Federal Bureau of Investigation, then spoke in his able and impressive manner on "The Modern Trends in Criminology."

The Association was addressed by his Worship, David H. Elton, K. C., Mayor of Lethbridge, Alberta, Canada, and an honorary member of the Montana Bar Association, who spoke upon the common bond between the United States and Canada.

The Association was then favored with an address by the Hon. Frank J. Hogan of Washington, D. C., President of the American Bar Association. Mr. Hogan ably set forth the place of the lawyer in modern society. He also encouraged increased membership in the American Bar Association and greater cooperation between the State Associations and the American Bar Association.

Resolutions were adopted commending Senator B. K. Wheeler for the distinguished services rendered in an effort to maintain the principles and philosophy of the constitution and to preserve the integrity of our judicial system. It was further moved and adopted that

ARTHUR F. LAMEY
President, Montana Bar Association

the proposals of the President be approved and that the requirements for admission to the Bar of Montana as recommended by the American Bar Association be recommended to the proper persons of the Bar, and of the Supreme Court of Montana; that principle of the integrated bar be approved and that the new President be authorized to appoint a committee of 7 members to present the matter to the Supreme Court and if the Court considers enabling legislation necessary, then to prepare and to present a bill before the legislative session of the State of Montana for 1939, and to use such efforts as seem practicable to secure the passage and approval of such a bill; that the principles advocated recommending a new and improved system for judicial selections in Montana be further considered by the Committee of 5 and that the same be presented to the 1939 meeting of the Association.

A special award was then presented to Clyde Hayden of Hamilton, Chairman of the Membership Committee for his outstanding work during the past year.

The Secretary, Lawrence E. Gaughan, of Bllings, presented his annual report, stating that the membership of the Association was now 358, being 65 above the all time high record established in 1926.

The following officers were elected:

Secretary - Treasurer, Lawrence E. Gaughan, of Billings; member of the House of Delegates of the American Bar Association, Julius J. Wuerthner, of Great Falls; Judicial District Vice-Presidents: 1st, Hugh R. Adair, He-

lena; 2nd, John E. Corette, Jr., Butte; 3rd, Ed. S. Irwin, Philipsburg; 4th, Leon L. Bulen, Missoula; 5th, M. M. Duncan, Virginia City; 6th, Ed Burke, Jr., Bozeman; 7th, Carl L. Brattin, Sidney; 8th, Loy J. Molumby, Great Falls; 9th, Louis P. Donovan, Shelby; 10th, H. L. DeKalb, Lewistown; 11th, Daniel J. Korn, Kalispell; 12th, Oscar Hauge, Havre; 13th, Robert N. Jones, Billings; 14th, G. J. Jeffries, Roundup; 15th, Arlie M. Poor, Wolf Point; 16th, Walter R. Flachsenhar, Terry; and 17th, Thos. Dignan, Jr., Glasgow.

Arthur F. Lamey, of Havre, was unanimously elected as President for the year 1938-1939.

Motion was then made that a suitable gift be presented to our retiring President, Julius J. Wuerthner, for his outstanding work during the past year.

LAWRENCE E. GAUGHAN,
Secretary

Senator Wheeler Honor Guest at North Dakota Meeting—Revision of Code Instead of Recompilation Favored

THE Eighteenth Annual meeting of the State Bar Association under the integrated Act of 1921 was held at Devils Lake, July 15 and 16, 1938.

Notwithstanding a pronounced continuing "depression," the registration was nearly two hundred, and the sessions were well attended and thoroughly enjoyable. The attendance was very representative of the lawyers and judiciary. The meetings were held in the beautiful Memorial building.

President L. J. Palda, Jr., of Minot, N. D., presided and called the convention to order at 10 o'clock A. M. The addresses on Friday's program were by Marion Leslie on "Woman's Place in the Legal Profession," President Palda on "Our Status Quo," Hon. F. Trafford Taylor, K. C. of Winnipeg on "Our Profession," A. W. Cupler on "The Bar Board and Its Functions," Major W. H. Drane Lester, Inspector of FBI, U. S. Department of Justice on "Modern Trends in Criminology."

The banquet Friday evening was largely attended, not only was the food good, the music entertaining, but President Palda as an interlocutor established a reputation.

In the absence of R. D. Chase of Jamestown, Hon. Geo. F. Shafer of Bismarck and Hon. Peter Garberg of Fargo "took down their hair," and proceeded to tell each other "Who you are and how you got that way," to the great edification of their listeners.

After the banquet, an address, "The Constitution and the Courts," was given by the Hon. Burton K. Wheeler, United States Senator from Montana, which gave many sidelights on the New Deal's interpretation of our rights and our liberties.

On Saturday the members enjoyed an address by the Hon. A. G. Burr, Justice of the Supreme Court of North Dakota upon "Treaties between States of the United States."

Perhaps the most interesting committee report was that of the Special Committee on Code Revision, which was appointed after much discussion and final decision of the convention that there should be a revision, instead of a recompilation. This Committee was instructed to prepare a bill for introduction at the next meeting of the Legislative Assembly and report it back to the meeting. The next day the Committee reported in a bill similar to the South Dakota Act, which vests in the Supreme Court the authority to appoint a Code Commission of three persons, residents of the state and learned in the law, as its members, which was heartily endorsed.

The annual election was held just shortly prior to the adjournment of the meeting, at which the following were elected as your officers for the coming year, Aloys Wartner, Sr., President, Clyde Duffy, Vice-president, M. L. McBride, Sec'y.-Treasurer.

Immediately following the adjournment of the annual meeting at Devils Lake the new executive committee met and organized. The new members are Clyde Duffy, Vice-president, Mack V. Traynor, Pres. Lake Region Bar Association, A. Leslie, Pres., Third Judicial District Bar Association, Alfred Zuger, President Fourth Judicial District Bar Association; and Kurt H. Krauth, Pres., Sixth Judicial District Bar Association. The hold over members are Philip B. Banks, Pres., First Judicial District Bar Association, O. B. Herigstad, Pres., Fifth Judicial District Bar Association, L. J. Palda, Jr., as Retiring President, Aloys Wartner, Sr., our new President and M. L. McBride, Sec'y.-Treas.

REPORT FROM BAR BRIEFS.

ALOYS WARTNER, SR.
President, State Bar Association of North Dakota

Ohio Bar Association Meets at Cleveland with American Bar—Amendment of State Procedure to Harmonize with New Federal Rules Recommended—Barkdull Elected President

THE program for the annual meet- of the Ohio State Bar Association was greatly compressed this year because of the desire to permit members to attend the meetings of the American Bar Association and its sections, convening in Cleveland during the same week. The principal business consisted of an election of officers and the presentation of committee reports, which had been printed in advance of the business session held on Monday, July 25.

Climaxing many years of work on the Probate Law and Executive Committees of the Ohio State Bar Association, Howard L. Barkdull of Cleveland was unanimously elected President.

As President of the Ohio State Bar Association, Mr. Barkdull succeeds Hon. Walter S. Ruff of Canton. They represent that Association in the House of Delegates of the American Bar Association.

The Committee on the Code of Civil Procedure and the Committee on Federal Practice and Procedure reported that the adoption of the new rules for the federal courts had given real impetus to the committees and that they believed that the State of Ohio should so amend its code so as to harmonize it with the new federal practice.

The Committee on Legal Ethics and Professional Conduct recommended in

its report the adoption of the revised Canons of Professional and Judicial Ethics of the American Bar Association approved at the Kansas City Annual Meeting last year. The Committee also reported that the Ohio Supreme Court had been petitioned to assume exclusive original jurisdiction in disbarment proceedings because in some cases flagrant misconduct has escaped discipline and because the Supreme Court, having granted the right to practice, should determine when that right should be terminated. The petition also requested that court to assume exclusive jurisdiction over reinstatements.

The Unauthorized Practice of Law Committee, after announcing that it had been successful in all litigation instituted by it, recommended that the matter of insurance service and tax bureaus be referred to the Committee on Unauthorized Practice of Law of the American Bar Association, which recommendation was approved. The Committee also reported that a petition had been filed asking the Supreme Court to adopt a rule to provide that it shall be unprofessional conduct to use a firm name unless each and every person whose name is used is a member of the Ohio Bar in good standing and a bona fide member of the firm, but that the name of a deceased partner may be used for a reasonable time after his death, not exceeding two years, and that the Court had expressed a desire to have the reaction of the Association to such proposal. That recommendation of the committee for the adoption of the proposed rule was not approved.

John K. Bartram of Marion was elected President of the Junior Bar, and

HOWARD L. BARKDULL
President, Ohio State Bar Association

Oscar T. Martin, II, of Springfield, was elected Secretary. Section Chairmen for the ensuing year will be: Judicial, Judge Irving Carpenter, Norwalk; Insurance Law, Earl F. Morris, Columbus; Real Estate, Hubert H. Schneider, Cleveland; Taxation, David A. Gaskill, Cleveland; Industrial Commission, Edwin H. Chaney, Cleveland; and Prosecuting Attorneys, Nicholas F. Nolan of Dayton.

J. L. W. Henney of Columbus was re-elected Secretary and Treasurer of the Association. Sol Goodman of Cincinnati was chosen Chairman, and Richard F. Stevens, of Elyria, Secretary, of the Council of Delegates.

South Dakota Bar Meets at Aberdeen—President Hogan Speaks—Roy Willy Elected President

ROY E. WILLY
President, The State Bar of South Dakota

THE annual meeting of the State Bar of South Dakota was held at Aberdeen on September 1 and 2. Thursday morning, in addition to the routine business, there was an address by President George Williams, of Rapid City, who spoke on "The Lawyer at the Bar." That afternoon, Mr. Fred E. Inbau, of the Chicago Police Scientific Crime Detection Laboratory, spoke on "Scientific Criminal Investigation and Scientific Evidence," and later in the afternoon President Hogan, of the American Bar Association, delivered an address on "Leadership and Independence of the American Lawyer."

Friday morning, Mr. Daniel H. Grady, of Portage, Wisconsin, delivered an address entitled "The Constitution and the Citizens of Tomorrow." Friday afternoon, United States Senator Herbert E. Hitchcock, of Mitchell, South Dakota, spoke on "Lawyers as Lawmakers." That evening at the annual banquet, Mr. George F. Mulligan, of Chicago, gave an after-dinner address entitled "Stare Decisis and the Status Quo."

The following officers were elected for the coming year: President, Roy E. Willy, Sioux Falls; Vice President, Lewis Benson, Huron; Secretary, Karl Goldsmith, Pierre; Treasurer, L. M. Simons, Belle Fourche.

Commissioners—First Circuit, Helmuth D. Giedd, Avon; Second Circuit, Roy D. Burns, Sioux Falls; Third Circuit, Alan Austin, Watertown; Fourth Circuit, M. A. Brown, Chamberlain; Fifth Circuit, B. A. Walton, Aberdeen; Sixth Circuit, R. F. Drewry, Pierre; Seventh Circuit, C. A. Wilson, Hot Springs; Eighth Circuit, Alex Rentto, Deadwood; Ninth Circuit, Lewis Benson, Huron; Tenth Circuit, Harry E. Mundt, Mound City; Eleventh Circuit, C. F. Manson, White River; Twelfth Circuit, A. E. Yager, Lemmon; At Large, T. M. Bailey, Sioux Falls; Harold O. Lovre, Hayti; William H. Warren, DeSmet.

KARL GOLDSMITH,
Secretary.

Vermont Association Establishes New Committees on Public Relations, Judicial Administration and Civil Liberties—Thomas B. Gay and Professor Griswold are Guest Speakers

THE sixty-first annual meeting of the Vermont Bar Association was held in the Assembly Hall of the National Life Insurance Company, in Montpelier on October 4 and 5, 1938. A large number of the members attended and a most interesting program was carried out. The committee reports showed a great deal of work had been done and they provoked more discussion than usual from the floor. A new feature was inaugurated this year in providing an automobile ride and afternoon tea for the visiting ladies. This was well attended and much enjoyed.

Twelve new members were admitted bringing the total membership of the Association to 342, the largest it has ever been.

Three memorial addresses were given, one by Chief Justice Moulton on the late Chief Justice Powers, one by Judge Shields on the late Justice Slack, and one by Miss Northrop on the late Chief Superior Judge Sherman. The President's address was entitled, "A Sovereign's Need" and emphasized the importance of giving adequate consideration to changing conditions in social, political and economic life.

A scholarly and timely address on current problems in taxation was given by Prof. Erwin N. Griswold, of Harvard Law School.

The principal address at the annual dinner was by Hon. Thomas Benjamin Gay, chairman of the House of Delegates of the American Bar Association who spoke on the value of organization for the lawyer.

An amendment to the Constitution was adopted establishing a committee on Public Relations. Several special committees were appointed in addition to the existing special committees which are continued. Among these are a committee to investigate the need of amending the divorce laws; a committee on Judicial Administration; a committee on economic condition of the Bar, and a committee on civil liberties.

The following officers were elected: president, James P. Leamy, Rutland; vice presidents, Neil D. Clawson, Brattleboro, Horace H. Powers, St. Albans, Joseph A. McNamara, Burlington; secretary, Harrison J. Conant, Montpelier; treasurer, Webster E. Miller, Montpelier; new member of Board of Managers, Francis E. Morrissey, Bennington; delegate to House of Delegates, George B. Young, Montpelier.

H. J. CONANT,
Secretary.

JAMES P. LEAMY
President, Vermont Bar Association

Virginia State Bar Celebrates Golden Anniversary with Three Charter Members Present—Membership Reaches New High—Annual Dinner on "American Bar Association Night"

LEWIS C. WILLIAMS
President, Virginia State Bar Association

THE Forty-Ninth Annual Meeting of the Virginia State Bar Association was held August 4-5-6, 1938, at the Virginia Hot Springs. Of special interest was the celebration of the fiftieth anniversary of the founding of this Association. Three of the charter members were present, and one, Mr. Wyndham R. Meredith, of Richmond, delighted the audience with reminisences of the organization and some of those prominent in its early affairs.

Among the other interesting features of the meeting was "Governor's Night," at which there were present on the rostrum, Governor Price of Virginia, Governor Holt of West Virginia, and Governor Hoey of North Carolina, and three former Governors of Virginia, Davis, Trinkle and Byrd. The annual address was delivered by Governor Hoey. Another feature was "American Bar Association Night," as the annual dinner was aptly called, because at the speakers' table were President Frank J. Hogan, T. Ben Gay, chairman of the House of Delegates, George M. Morris, former chairman of the House. Mr. Morris introduced Mr. Hogan, who delivered the address of the evening. Hon. John J. Parker, Senior Circuit Judge of the Fourth Judicial Circuit, delivered a most interesting and instructive address on the "New Federal Procedure." In addition to the formal address, Judge Parker graciously gave an informal presentation of some practical questions involved in the new Rules.

This meeting closed a most satisfactory year in the history of the Association, a year marked by many constructive achievements, increased membership and awakened interest, for all of which too much credit cannot be given to the president, Frank W. Rogers, of Roanoke. Total attendance exceeded four hundred, and membership reached the highwater mark of 1,327.

The following officers were elected for the year 1938-39: Lewis C. Williams, of Richmond, president; John L. Abbot, of Lynchburg; Kennon C. Whittle, of Martinsville; Ira M. Quillen, of Lebanon; David Nelson Sutton, of West Point; and George N. Conrad, of Harrisonburg, vice presidents; Cassius M. Chichester, of Richmond, secreary-treasurer; Charles E. Pollard, of Petersburg, and Philip P. Burks, of Bedford, members of Executive Committee; and Stuart B. Campbell, of Wytheville, delegate to House of Delegates of the American Bar Association.

Washington State Bar Inaugurates Section Meetings—Legal Aid and Unauthorized Practice Reports Discussed During General Sessions—Judicial Selection Committee Reports Excellent Cooperation from Governor

THE annual meeting of the Washington State Bar Association was held at Paradise Valley, Rainier National Park, on July 29 and 30. About 300 lawyers were in attendance, in addition to the wives and families of many of the members.

Preceding the meeting, the Association of Superior Court Judges held their annual meeting, at the close of which the Honorable C. G. Jeffers of Ephrata, Washington, was elected as President for the ensuing year.

An innovation this year was that the first morning of the convention was devoted to sectional meetings presided over by the chairmen of the various committees. Considerable interest was shown in these meetings, which considered the following subjects: public relations, legislation, free legal aid, law enforcement and the unauthorized practice of the law. The groups being small everyone present felt free to express his own ideas, as a result of which several worth while suggestions were made for the consideration of the convention and the Board of Governors.

The general session of the convention convened in the afternoon for the purpose of hearing the address of the President, Hon. J. E. Stewart, in which he reviewed the work of the past year. Mr. Stewart in his address discussed the overcrowded condition of the profession and the serious plight in which many lawyers find themselves at the present time as a result of the economic situation. Attention was also called to the steps taken by the association to discipline certain members and to remove from its ranks those unworthy of engaging in the practice of law.

ROBERT E. EVANS
President, Washington State Bar Association

On the floor of the convention the two subjects that brought forth the most discussion were free legal aid and the unauthorized practice of the law.

Legal Aid Discussed

The free legal aid discussion was led by Mr. Lane Summers of the Seattle Bar, chairman of the committee, who at the present time is engaged in making a survey for the American Bar Association for the purpose of ascertaining the necessity for free legal aid in the State of Washington. He pointed out that there is an insistent demand for some workable agency to be set up for the purpose of supplying free legal aid to the indigent. The consensus of opinion was that this matter should remain under control of the Bar Association, and to that end the committee was directed to continue its study and urge the various local associations to take such steps as necessary to set up workable committees within their own organizations for free legal aid where the need for the same exists.

Unauthorized Practice Condemned

Mr. Robert R. Pence, of the Spokane Bar, chairman of the committee on unauthorized practice of the law, brought to the attention of those present the many inroads being made upon the legal profession by accountants, realtors, adjusters, notaries public and the like. He reported that several actions are being started to enforce the discontinuance of this practice.

The Association was fortunate in having as its guest speaker Thomas Reed Powell of the Harvard Law School, who gave a very interesting paper on "Constitution for an Indefinite and Expanding Future."

The report of the committee on the selection of judges made by Mr. Elias A. Wright of the Seattle Bar, brought to the attention of the members that the committee had been playing no small part in the appointment of judges to fill vacancies caused by death or resignation. The committee has received splendid cooperation from the Hon. Clarence D. Martin, Governor of the State of Washington, as a result of which his appointments have been well received by the members of the Bar and the public in general. To date the Governor has followed very closely the recommendations of the committee and the local Bar Associations.

All was not serious at the convention. On Friday evening several members of the Bar under the able direction of Tracy Griffin presented for our edification and enlightenment a hearing before the National Labor Relations Board. At the Saturday noon luncheon the membership was delightfully entertained by a group of young lawyers from Seattle. Several of the older practitioners were put to shame in a pseudo radio contest where they matched wits with some of the younger members.

Annual Banquet

The meeting was brought to a close with the annual banquet held Saturday evening. W. B. Chandler, of the Spokane Bar, acquitted himself in masterly fashion as toastmaster, and notwithstanding a long array of speakers, was able to move the program along with considerable dispatch. Splendid talks were made by Thomas Reed Powell of the Harvard Law School, R. L. Maitland, K. C., of Vancouver, B. C., and Robert F. Maguire of the Portland, Oregon, Bar, who brought to the meeting greetings from the Oregon Bar Association, as well as word from the American Bar Association where he was in attendance, having hastened to the meeting by airplane from Cleveland.

As provided by the by-laws of the Association, the President is selected by the Board of Governors and the appointment announced the last day of the annual meeting. When two members of the Board of Governors were directed by the chairman to escort the newly elected President to the head table, speculation was rife as to who he would be. When Robert E. Evans, of Tacoma, Washington, was escorted to the chair, an enthusiastic outburst of applause gave evidence to the fact that the Board of Governors had made a judicious selection. Mr. Evans, of the firm of Evans & Ellis, is one of the outstanding practitioners of Tacoma and has long been active in the affairs of the Washington State and American Bar Associations. He brings to the office a wealth of experience in matters vitally affecting the interests of the lawyer today, and there is no doubt that much will be accomplished under his able guidance and direction during the coming year.

PHILIP S. BROOKE, Spokane
Member, Board of Governors.

Wisconsin Bar Holds Sixtieth Meeting—Hon. Arthur T. Vanderbilt and Chief Justice Rosenberry on Program—Judicial Selection Study Continues

THE 60th anniversary meeting of the State Bar Association of Wisconsin was held at Madison, June 22 to 24 inclusive, with a total attendance of approximately 460. The illness of President Poss prevented him from being present. The office of vice-president being vacant, the Executive Committee designated Maxwell Herriott, President of the Milwaukee Bar Association, to take over the President's duties during the meeting. He, in turn, arranged with past presidents to act as chairmen at the various sessions. Past presidents who acted as chairmen of the various sessions were Mr. Claire B. Bird, Mr. Carl B. Rix, Mr. Frank T. Boesel, Mr. W. T. Doar and Mr. Otto A. Oestreich.

City Attorney Harold Hanson, acting for Mayor James Law of Madison, gave a brief address of welcome. Glen H. Bell, President of the Dane County Bar, welcomed those in attendance on behalf of the Dane County Bar.

Pres. Vanderbilt and Chief Justice Rosenberry Speak

The business sessions were well attended. Arthur T. Vanderbilt, President of the American Bar Association, gave a most interesting account of his visit to England, and the Chief Justice of the Wisconsin Supreme Court, Hon. Marvin B. Rosenberry, spoke on the subject of Judicial Administration.

The report of the Committee on Judicial Selection, presented by Ralph M. Hoyt, chairman, which followed the address of the Chief Justice, reviewed the work of the committee. It stated that the committee was not fully convinced that there was at present a crying demand for change in method of judicial selection in Wisconsin. The report recommended that the committee should continue its study of this subject as the problems of judicial selection are worked out in other states, "which perhaps have greater need to act as pioneers in the movement than has the state of Wisconsin."

The Committee on Law Lists was discharged upon recommendation of its chairman, Chauncey E. Blake of Madison, because the American Bar Association had adopted rules and standards as to law lists and created a special committee to make such rules effective, it being believed therefore that the work

ROBERT M. RIESER
President, State Bar Association of Wisconsin

GODFREY L. MUNTER
New President of the Bar Association of the District of Columbia

of this committee had been completed.

The Association refused to adopt a resolution which would declare it to be improper for any practicing attorney to manage or solicit the management of campaigns for judicial candidates either for election or re-election or solicit the contribution of campaign funds, either directly or indirectly, through the means of clubs or other devices.

The following are the newly elected officers and members of the Board of Governors:

Officers and Executive Committee

President—Robert M. Rieser, Madison.

Vice-president—Harlan B. Rogers, Portage.

Secretary and Treasurer—Gilson G. Glasier, Madison.

Assistant Secretary—Arthur A. McLeod, Madison.

Executive Committee—T. P. Silverwood, Green Bay; Geo. D. Spohn, Milwaukee; O. J. Falge, Ladysmith; Franklin L. Orth, Milwaukee; M. A. Jacobson, Waukesha; Sheldon Vance, Fort Atkinson; Timothy P. Donovan, Tomah.

Board of Governors: 1st Circuit—Walter W. Hammond, Kenosha.

2nd Circuit—John F. Baker, William Doll, Gerald P. Hayes, Herbert C. Hirschboeck, Arthur A. Mueller, Paul R. Newcomb, Franklin L. Orth, Charles B. Quarles, George D. Spohn, all of Milwaukee. 3rd Circuit—Charles H. Williams, Oshkosh; 4th Circuit—G. W. Buchen, Sheboygan; 5th Circuit—J. Scot Earll, Prairie du Chien; 6th Circuit—Timothy P. Donovan, Tomah; 7th Circuit—Walter Melchoir, New London; 8th Circuit—Robert Barnum, Jr., Hudson; 9th Circuit—J. W. Frenz, Baraboo; A. E. O'Brien, Madison; 10th Circuit—Edgar Becker, Appleton; 11th Circuit—Barney B. Barstow, Superior; 12th Circuit—Sheldon Vance, Ft. Atkinson; 13th Circuit—Marcus A. Jacobson, Waukesha; 14th Circuit—T. P. Silverwood, Green Bay; 15th Circuit—C. A. Lamoreux, Ashland; 16th Circuit—R. E. Puchner, Wausau; 17th Circuit—Charles E. Curran, Mauston; 18th Circuit—Cecelia Doyle, Fond du Lac; 19th Circuit—O. J. Falge, Ladysmith; 20th Circuit — Adolph P. Lehner, Oconto Falls.

GILSON G. GLASIER,
Secretary.